165-482

see 463
165-482

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 783. 322

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 16, 1895.

(15993.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 703.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript	1	1
Transcript from United States circuit court, district of Minnesota	2	1
Bill of complaint	2	1
Answer of St. Paul and Sioux City Railroad Company	12	7
Memorandum as to filing of replication	26	14
Stipulation that answer of the railroad company shall stand as the answer of the other defendants	26	14
Agreed statement of facts	26	14
Stipulation as to interrogatories and cross-interrogatories	33	18
Testimony for complainant	34	19
Interrogatories to Commissioner General Land Office	34	19
S. W. Lamoreaux, answers to interrogatories	36	19
Interrogatories to chief of railroad division, General Land Office	39	21
W. J. McGee, answers to interrogatories	41	22
Exhibit A (certificate of Commissioner General Land Office as to selections of land pending March 3, 1887)	43	23
Boyd W. Randall	45	24
Nancy J. Randall	63	35
Testimony for defendants	70	39
Livingston Quackenbush	70	39
John Kapiska	71	39
Herman Kapiska	89	50
Alfred J. Mohler	99	56
L. Quackenbush, recalled	105	60

Transcript from United States circuit court, etc.—Continued.	Original.	Print.
Testimony for complainant	109	62
James E. Moore	109	62
Letter of James E. Moore to Curtis & Burdett, February 20, 1890	121	69
Exhibit E (letter of Commissioner General Land Office to W. P. Jewett, February 17, 1890)	138	78
Exhibit F (letter of Assistant Commissioner General Land Office to Curtis & Burdett, February 17, 1890)	139	79
Exhibit G (letter of J. E. Moore to Commissioner General Land Office, February 20, 1890)	140	80
Stipulation as to complainant's Exhibit B	141	80
Defendants' Exhibit A (deed of W. Boright and wife to L. Quackenbush, April 17, 1882)	141	80
Order appointing special master	143	81
Stipulation for appointment of special master	144	82
Argument commenced	146	82
Argument continued	148	83
Order, cause submitted	149	84
Decree	149	84
Stipulation for change of venue	150	85
Citation	151	85
Petition for and order allowing appeal to United States circuit court of appeals	152	85
Assignment of errors	153	86
Stipulation as to record for United States circuit court of appeals	156	88
Appearance of counsel for appellants	158	89
Appearance of counsel for appellees	158	89
Order, cause submitted	159	89
Opinion of United States circuit court of appeals	161	90
Decree	163	91
Petition for and order allowing appeal to the Supreme Court	164	91
Affidavit of Robert G. Evans as to amount involved	165	92
Assignment of errors	166	92
Citation and admission of service	169	94
Clerk's certificate to transcript	170	94

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1895, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday, to wit, the sixth day of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the third day of December, A. D. 1894, a transcript of record, in pursuance to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of The United States of America, appellant, vs. St. Paul & Sioux City Railroad Company et al., appellees, which said transcript of record is in the words and figures following, to wit:

2 Circuit court of the United States in and for the district of Minnesota, second division. 1

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, JOHN KAPISKA, ET AL., DEFENDANTS. 2

To the Honorable Judges of the Circuit Court for the District of Minnesota:

1. The United States of America by its Attorney-General brings this its bill of complaint against John Kapiska, Mary Kapiska, his 3
wife, Livingston Quackenbush and Mary Quackenbush his wife, Herman Kapiska and Jane Kapiska, his wife, and Alfred J. Mohr, residents and citizens of Minnesota, and the St. Paul & Sioux City Railroad Company, a corporation duly organized and
2½ incorporated under the laws of the State of Minnesota, and transacting business within the State of Minnesota.

2. Humbly complainant showeth your orator unto your honors that under and pursuant to an act of the legislature of the Territory of Minnesota, entitled "A bill for an act to incorporate the Root 4
River Valley and the Southern Minnesota Railroad Company," approved March 2nd, A. D. 1855, a railroad corporation was duly created and organized under the name and style of the "Root River Valley and Southern Minnesota Railroad Company." That in pursuance of said act and the organization aforesaid the said Root River Valley and Southern Minnesota Railroad Company became and continued to exist as a railway corporation under the title and name aforesaid, in the said Territory of Minnesota, until May 23rd, A. D. 1857, when under and pursuant to an act of the legislature of 5
the said Territory of Minnesota entitled "A bill to change the name of the Root River Valley and the Southern Minnesota Railroad

vivor or survivors, successor or successors, for the trust therein expressed, the entire railroad of said company from La Crescent, via Target Lake, up the valley of the Root River to a point of junction with the railroad from Winona, via St. Peter, to a point on Big Sioux
17 River, south of the 45th parallel of latitude, east of range 17, in the State of Minnesota, and also the railroads from St. Paul and St. Anthony, via Minneapolis, to a point of junction at Shakopee City, in the county of Scott, and then thence, via Belle Plain, Clarksville, Le Sueur, Traverse de Sioux, Kasota, Mankato, and South Bend, to the southern boundary of the State of Minnesota, in the direction of the mouth of the Big Sioux River; also all the roads, lands, and franchises of said company.

10. That afterwards, on October 20th, A. D. 1860, default having
18 been made by the said Southern Minnesota Railroad Company in the condition of said indenture, the same was duly foreclosed, and by said foreclosure all the lands, properties, rights, privileges, and franchises of every kind and nature became the property of
7 the said State of Minnesota, which was formerly the Territory of Minnesota. That afterwards, under and pursuant to section 1, chapter 2, of an act of the legislature of the State of Minnesota, entitled "An act to facilitate the construction of the Southern Minnesota Railroad, and to amend and continue certain acts in rela-
19 tion thereto," approved March 4th, A. D. 1864, the said Southern Minnesota Railroad Company was divided into two corporations, to wit: The Southern Minnesota Railroad Company and the Minnesota Valley Railroad Company, and thereby the Minnesota Valley Railroad Company was duly created and organized, and became and continued to exist as a railroad company, under the title and name of The Minnesota Valley Railroad Company, within the said State of Minnesota, until June 7th, A. D. 1870, and by said section 1, chapter 2, of said last mentioned act, all the rights, privileges, property,
20 franchises, and interests of the Southern Minnesota Railroad Company, acquired of the State of Minnesota by virtue of any acts, deeds, sale, foreclosure, agreement, or thing by the said company hereinbefore done or suffered, or by reason of any forfeiture, or by virtue of any law of the State, or any foreclosure by the governor of the State, acting for or in behalf of the State, or by reason of the sale of the same or any part thereof by the governor of the State of Minnesota, and bid in and purchased by the governor of the State of Minnesota, for the benefit of the State of Minnesota, pertaining
21 to the line of road from St. Paul and from St. Anthony, via Minneapolis, to the point of junction at Shakopee City, in the county of Scott, and thence, via Belle Plain, Clarksville, Le Sueur, Traverse de Sioux, St. Peter, Kasota, Mankato, and South Bend, to the
8 southern boundary of the former Territory of Minnesota, in the direction of the Big Sioux River, and all the lands, interests, rights, powers, and privileges granted by and conferred upon the Territory of Minnesota in and by the act of Congress approved March 3rd, A. D. 1857, pertaining to said line of road, entitled "An
22 act making a grant of land to the Territory of Minnesota, in alter-

nate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of certain railroads in said State," were thereby granted, vested in, and transferred to The Minnesota Valley Railroad Company, as follows, to wit: All the rights, immunities, benefits, and privileges, land or property, aforesaid, pertaining, relating to, or applicable to that portion of said road aforesaid.

11. That afterwards the Minnesota Valley Railroad Company, by a resolution of its board of directors, determined to change the name of said company to that of the St. Paul & Sioux City Railroad Company, and under and pursuant to an act of the legislature of the said State of Minnesota entitled "An act relating to the St. Paul & Sioux City Railroad Company," approved March 1st, A. D. 1870, the name of the said corporation known as the Minnesota Valley Railroad Company was changed to that of the St. Paul & Sioux City Railroad Company, and the Minnesota Valley Railroad Company, by its proper officers, duly filed a certificate changing the name of the Minnesota Valley Railroad Company to the St. Paul & Sioux City Railroad Company and accepting the provisions of the act relating to the St. Paul and Sioux City Railroad Company, approved March 1st, 1870, in the office of the secretary of state of the State of Minnesota on June 7th, A. D. 1870. That thereafter and on the 3rd day of March, A. D. 1887, the Congress of the United States passed an act, as follows: "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes, which said act contained the following sections: "That the Secretary of the Interior be and is hereby authorized to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad grants made by Congress to aid in the construction of railroads heretofore unadjusted."

SECTION 2. "That if it shall appear upon the completion of such adjustments, respectively, or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety (90) days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title theretofore issued for such lands and to restore the title thereof to the United States."

12. That all of said land was erroneously certified or patented to the said State of Minnesota to aid in the construction of said line of railroad as aforesaid, and the rights of pre-

emption had attached to said tract of land before the said line of railroad was definitely fixed, as hereinbefore more particularly set forth.

28 13. That at and prior to the 17th day of February, 1890, the said grant in aid of said railroad was unadjusted, and the said land hereinbefore described having been erroneously certified or patented by the said United States to the State of Minnesota for the benefit of the said defendant railroad company, and on the 17th day of February, A. D. 1890, it duly appearing the grant in aid of said railroad company was unadjusted and the said tract of land hereinbefore described had been erroneously certified by the officers of the said United States to the State of Minnesota for the use and benefit of
29 said defendant company through and under a grant from the United States to aid in the construction of said railroad, demand was duly made February 17th, 1890, by the Secretary of the Interior upon said company for the relinquishment and reconveyance to the United States of said tract of land hereinbefore described and the whole thereof.

14. That more than ninety (90) days have elapsed since said demand was made, and said defendant company refused during the said ninety (90) days and still refuses to relinquish and reconvey said land or any part thereof hereinbefore described to the United States.

30 15. That John Kapiska, Mary Kapiska, his wife; Livingston Quackenbush and Mary Quackenbush, his wife; Herman Kapiska and Jane Kapiska, his wife, and Alfred J. Moler claim some right, title, or interest in and to said real estate hereinbefore described by, through, or under a conveyance from the said St. Paul
11 and Sioux City Railroad Company and are made parties hereto that they and each and all of them may answer as to their interest in said real estate if any they or any of them have.

31 And may it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this court, directed to the defendant, the St. Paul & Sioux City Railroad Company and John Kapiska, Mary Kapiska, Washington Bright, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Moler, commanding them at a certain day, and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular the premises, and to stand to perform and abide such order and decree herein as to your honors shall seem
32 meet, and your orator will ever pray.

Wherefore your orator prays for a decree herein against the defendants and each of them that the land hereinbefore described be restored to your orator; that the certification thereof to the State of Minnesota and the conveyance thereof by the said State to the St. Paul and Sioux City Railroad Company and each thereof be set aside and cancelled; that said defendants, John Kapiska and others, be decreed

to have no right, title, or interest in or to said land, and for such other and further relief as may be just.

W. H. H. MILLER,
Attorney-General.

EUGENE G. HAY, 33
U. S. District Attorney,
Solicitors for Complainant.

ROBERT G. EVANS,
Special Asst. U. S. Attorney, of Counsel.

12 [Title of cause.]

Answer of defendant, the St. Paul and Sioux City Railroad Company.

The answer of the defendant, The Saint Paul and Sioux City Rail- 34
road Company, to the bill and amended bill of complaint of the above-named complainant herein:

The defendant, The St. Paul and Sioux City Railroad Company, to the bill and amended bill of complaint in the above-entitled suit admits and avers:

1. That the Root River Valley and Southern Minnesota Railroad Company was created, organized, and existed as a corporation, and that its name was changed to "The Southern Minnesota Railroad Company," as in the bill of complaint alleged.

2. That the United States, by the act of Congress in the bill of 35
complaint referred to, approved March 3rd, 1857, granted to the State (then Territory) of Minnesota every alternate section of land designated by odd numbers for six sections in width on each side of each of certain railroads and branches to aid in their construction, and that the line of road of said Southern Minnesota Railroad Company was one of the lines in aid of which said grant was made, and said company became and was one of the beneficiaries of said grant.

3. That said Southern Minnesota Railroad Company located and definitely fixed its line of road past the lands in question in this suit 36
before the eighteenth day of October, A. D. 1857; and that said lands in question are within the six-mile or place limits of said rail-
road company's grant, as fixed and adjusted by the Secretary
13 of the Interior of the United States; and that when and before said line of said road was definitely fixed, many of the lands granted by said act of Congress to aid in the building thereof, viz, alternate odd-numbered sections within six miles on each side of the said line, had been sold and disposed of by the United States and 37
had become subject to preemption, and were by reason thereof excepted from the operation of said grant.

4. That the Secretary of the Interior of the United States, under and in pursuance of the power and authority in him vested in the premises, considered, held, and decided that said lands in controversy in this suit, viz, the south half (S. $\frac{1}{2}$) of the northeast one-fourth (NE. $\frac{1}{4}$) of section 29, Township III, range 25, were granted by said act of Congress to the Territory and State of Minnesota in aid of the building of the said line of road of the Southern Minnesota

Railroad Company, and he indicated them as lands so granted, and on the 26th day of August, A. D. 1864, certified them to the State for the benefit of and to aid in the building of the said line, and charged them to said grant in aid of this defendant's line.

5. That said Southern Minnesota Railroad Company as alleged in the bill of complaint, executed to Benjamin Pringle and Andrew G. Chatfield a mortgage or deed of trust of its property for the uses and purposes alleged; and on the foreclosure of said mortgage or deed of trust, the State of Minnesota acquired all the lands, property, rights, privileges, franchises, and immunities of every kind and nature theretofore owned by said Southern Minnesota Railroad Company.

6. That afterward the said Southern Minnesota Railroad Company was, as alleged, divided and made into two corporations, viz, The Southern Minnesota Railroad Company and "The Minnesota Valley Railroad Company," which latter is this defendant.

7. That the State of Minnesota granted to and conferred upon this defendant, by the name of The Minnesota Valley Railroad Company, all the property, rights, immunities, privileges, and franchises ever owned or possessed by the said Southern Minnesota Railroad Company, applicable, relating, or pertaining to that part of the line of said road from St. Paul and from St. Anthony, via Minneapolis, to the point of junction at Shakopee City, in the county of Scott, and via Belle Plaine, Clarksville, Le Sueur, Traverse de Sioux, St. Peter, Kasota, Mankato, and South Bend, to the southern boundary of the former Territory of Minnesota in the direction of the Big Sioux River; and that afterward, as alleged, this defendant's name was changed to that of the "St. Paul and Sioux City Railroad Company," by which name it has ever since been known.

8. That the Congress of the United States passed the act of March 3rd, A. D., 1887, as alleged, to the provisions of which for greater certainty this defendant begs leave to refer.

9. This defendant expressly denies that the lands in controversy in this suit were inadvertently, erroneously, improperly, or by mistake or without authority of law certified to the State of Minnesota; or that at or before the time when the line or route of its road was definitely fixed past or opposite them anyone was in possession of them or had made valuable or any improvements on them, or had cultivated or resided on them, or that any right of preemption had then or has since attached to them.

This defendant farther avers and saith:

10. That by said act of Congress of March 3rd, A. D. 1857, the United States granted to the Territory of Minnesota to aid in the building of this defendant's line (and other lines) of road "every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads." And it was in and by said act provided as follows: "But in case it shall appear that the United States have, when the lines or routes of said roads or branches are definitely fixed, sold any sections or parts thereof, granted as aforesaid, or that the right of preemption has attached to

the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the rights of preemption have attached as aforesaid: * * * Provided, That the said lands hereby granted 45
to the said Territory or future State shall be subject to the future disposal of the legislature thereof for the purposes herein expressed, and no other."

11. And by section 7 of an act of Congress approved May
16 12th, A. D. 1864, entitled "An act for a grant of lands to the State of Iowa in alternate sections and to aid in the construction of a railroad in said State" there were granted to the State of Minnesota for the purpose of aiding in the construction of this defendant's said line of road "four additional alternate sections per 46
mile, to be selected upon the same conditions, restrictions, and limitations as are contained" in the said land grant act of March 3rd, A. D. 1857: "Provided, That the land to be so located * * * may be selected within twenty miles of the line of said road, but in no case at a greater distance therefrom."

12. And by an act of Congress approved March 3rd, A. D. 1865, entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," the quantity of land granted by said act of March 3rd, A. D. 1857, was increased to ten sections per mile for each of 47
the roads. And by sections two and five of the said act of March 3rd, A. D. 1865, it was provided as follows (section 2): "That the first proviso in the first section of the act aforesaid (of March 3rd, 1857) shall be so amended as to read as follows, to wit:

"Provided, That the land to be so located shall in no case be further than twenty miles from the line of said roads and branches to aid in the construction of each of which said grant is made and said lands granted shall in all cases be indicated by the Secretary of the Interior." (Section 5): "That the lands hereby granted shall be 48
subject to the disposal of the legislature of the State of Minnesota for the purposes aforesaid, and no other."

13. That by an act of the legislature of Minnesota ap-
17 proved March 4th, A. D. 1864, entitled "An act to facilitate the construction of the Southern Minnesota Railroad and to continue certain acts in relation thereto," this defendant, by the name of the Minnesota Valley Railroad Company, was authorized and empowered to construct, equip, and operate the said line of railroad 49
from St. Paul and from St. Anthony via Minneapolis to a point of junction west of the Mississippi to the southern boundary of the State in the direction of the mouth of the Big Sioux River, and was made the beneficiary of the said grant, so far as it related to that line of road. And by the same act the governor of the State was authorized and directed, on the performance by the defendant of the conditions on which said grant was made, to convey to it in the

granted limits as against any homestead or preemption filing or entry thereafter initiated as soon as and when the line was surveyed, staked out, and marked on the face of the earth; (2) that whenever on any subdivision of an odd-numbered section within the granted or place limits at the date of the definite location of the road, there was a valid preemption or homestead filing or entry which was after-
62 ward set aside and canceled before the adjustment of the grant, such subdivision thereupon enured to the grant; and (3) that when such a filing or entry was fraudulent or invalid it did not operate to take the land out of the grant. And in pursuance of and in accordance with the aforesaid rules, the grants to or for each and all of the land-grant railroad companies in the State of Minnesota were adjusted and administered. And prior to the year 1879 no court of the United States, or of any State, had, as this defendant alleges and believes, questioned the correctness of any of said rules. And rely-
63 ing on the correctness of said rules, the lands granted to the Territory or State of Minnesota in aid of railroads were certified to the State for and in aid of the lines of the several railroad companies that were respectively the beneficiaries of such grants, and conveyed by the State to the respective companies owning said several lines
22 of road and sold and conveyed by said railroad companies respectively to purchasers who settled on and improved them. That each and all of said rules were promulgated and enforced by the Secretary of the Interior and the other officers of the United States
64 whose duty it was to adjust and administer such grants. And the lands enuring to the said grants in accordance with those rules, including the lands in question in this suit, were by said officers charged to the several grants respectively and deducted from the quantity of land which the said land-grant companies, including this defendant, were entitled to receive under their respective grants. And, according to the statutes of the United States and the settled rules of the Interior Department of the United States, if the home-
65 stead and preemption entries and filings in the bill of complaint herein alleged to have been made on the lands in question had been allowed and sustained, or if it had been held that they excepted the lands on which they were made from the grant in aid of this defendant's line, this defendant would have had the right to select in lieu thereof an equal quantity of lands within the limits of its grant as indemnity for those so lost. And when the lands in question were certified to the State as enuring to said grant there were within the limits of this defendant's grant, subject to be selected for such indem-
66 nity a sufficient quantity of lands to make up for the loss of them. That by the disallowance of such entries and filings, and by the certifying and charging of those lands to this defendant, and by the other rulings of the Secretary of the Interior the United States denied such right of selection, and all the lands which defendant
23 would then have so selected have since been disposed of by the United States. And the United States, if they should now reverse the rulings heretofore made as aforesaid, would take advan-
67 tage of their own wrong and unjustly deprive this defendant of its legal and equitable rights without any fault or negligence on its part.

That said rules, in accordance with which defendant's grant was adjusted, long since became rules of property that can not now be disregarded or departed from without great injustice and irreparable injury to defendant and other land-grant railroad companies in this State and their grantees and successors in interest. That to depart from these rules now would unsettle and invalidate the title to many hundreds of thousands of acres of land, long since purchased by those who settled upon and improved the same, relying and having a right 68
to rely on the then unbroken line of rulings and decisions of the Land Department of the United States, and of this and other States, and of the courts of this and other States. And this defendant denies that the United States lost any land by the aforesaid rulings, or that any of these lands would revert to the United States if the certificates or patents therefor were set aside.

That prior to January, 1890, and for many years prior to the passage of said act of March 3rd, 1887, the grant of lands in aid of this defendant's line of road had been adjusted from its eastern terminus westwardly to a point far west of the lands in question in 69
this suit and practically throughout its entire length.

That if the certification to the State for and the deed from the State to this defendant were set aside and canceled, the United
24 States would have nothing but the formal or naked legal title to the lands in question; and the whole interest in them would belong to and the legal title enure to some other person in whose interest and for whom this suit is brought; and this defend- 70
ant farther alleges and insists that the United States can not and should not maintain this suit because of the laches and delay in bringing the same; and because of the long acquiescence in the claim and title of this defendant and its grantees; and because this suit is barred by the statute of limitations of the State of Minnesota; and because the officers of the United States whose duty it was to construe, adjust, and administer such grants certified to the State the lands in question as enuring to the State under the grant and charged them to the defendant's grant, and required this defendant to pay the fees to the register and receiver of the local land office for the 71
certification of them, and refused to permit this defendant to select lands in lieu of them as it might have done; and because this defendant was clearly entitled to either these lands or an equal number of acres of the lands in lieu thereof; and because if the complainant should succeed in this suit this defendant, without either fault or negligence on its part, would by the acts of the officers of the United States authorized to act for the United States in the premises be deprived of both; and because the rules in pursuance of which these lands were certified to the State and held to enure to this defendant's grant long since became rules of property the disre- 72
gard of which now would work great injustice and irreparable injury to this defendant and the other beneficiaries of such grants in this State, and to their grantees and successors in interest.
25 And defendant further insists that the act of Congress of March 3d, 1887, referred to in the bill of complaint herein is inapplicable to the grant of this defendant, and especially to that

73 part of it within which the lands in question lie that was many years ago adjusted in accordance with rules then and theretofore unquestioned.

And the defendant saith and insists that the alleged cause of action in this suit did not accrue within six years, or within fifteen years, before this suit was brought, and that this suit is barred by the statute of limitations and of the State of Minnesota, which this defendant hereby pleads and invokes as a defense and bar thereto. And this defendant farther insists that there is a defect of parties
74 defendant herein in that the State of Minnesota, this defendant's grantor, and every person interested in said lands as purchasers, owners, mortgages, or otherwise, and especially that the following named or described parties, who own or owned said lands, and who conveyed the same, are not parties hereto, viz: Washington Boright, L. Quackenbush and his wife, Herman Kapiska and his wife, Alfred J. Moler and his wife, and the wife of the defendant, John Kapiska. And this defendant claims and insists that each and all of said persons and each and every person who has any interest in said lands, or who conveyed the same with covenants of warranty, or who
75 were parties to any instrument which by this suit it is sought to set aside or anaul, is a necessary and indispensable party to this suit.

Except as above admitted, this defendant denies each and every allegation of the bill of complaint herein.

26 Wherefore this defendant prays that it may be hence dismissed with its reasonable costs and charges in this behalf wrongfully sustained.

WILSON & BOWERS,
76 *Solicitors for the Defendants, the Saint Paul and Sioux City Railroad Company and others.*
THOMAS WILSON,
Of Counsel.

Verified by Marvin Hughitt as president of the St. Paul and Sioux City Railroad Co.

Stipulation as to answer.

Subsequent to the filing of the foregoing answer of the defendant railroad company the complainant by consent amended its bill by making the person named in said answer as interested in this suit, to wit, Mary Kapiska and others, defendants, and it was thereupon stipulated and agreed (Messrs. Wilson & Bowers appearing for all of the defendants) that the answer filed by the said railroad company to the original bill should stand as the answer of each and all of the defendants to the amended bill, and that the replication filed by the complainant to the original answer should stand as a replication to the answer of all of the defendants.

Replication.

77 The complainant duly filed a general replication to the foregoing answer of all the defendants.

[Title of cause.]

Agreed statement of facts.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled suit for the purposes of the trial of the same, as follows:

1. That the tract of land in controversy in this suit lies within the six-mile or primary limits of the grant to the Territory (now State) of Minnesota under the act of Congress of March 3rd, 1857, 78
referred to in the bill of complaint, for the benefit of what is now the St. Paul & Sioux City Railroad, and on the 26th of August, 1864, the Secretary of the Interior certified said lands to the State of Minnesota as lands granted by the United States by act of
27 Congress approved March 3rd, 1857, to aid in the building of the line of road of the defendant, the St. Paul & Sioux City Railroad Company.

2. That the map of definite location of the line or route of road described in the bill herein opposite to or past the tract of land in 79
controversy in this suit was filed in the office of the Commissioner of the General Land Office on February 20th, 1858, and not before.

3. That the records of the General and proper local land offices of the United States show that one Boyd W. Randall, on the 4th day of October, 1856, made a preemption filing on said land at the local land office at St. Peter, Minnesota—that being the district in which said lines lie—alleging settlement thereon on August 1st, 1856, which filing was prima facie regular and valid. 80

4. That on April 28, 1866, the local land officers at St. Peter, Minnesota, allowed said Randall to prove up his pre'mption claim to said land, and to make payment therefor, which he did. And said local land officers thereupon issued to him a cash entry certificate in the usual form, and subsequently, to wit, on November 19th, 1866, the Commissioner of the General Land Office cancelled that certificate and entry, with others, by order issued to said local land officers at St. Peter, in words and figures following, to-wit:

"Cancelled for the reason that the settlers in each case did not appear at your office and prove up and pay for the land embraced 81
in the several entries before the day of sale, as required by notice attached—two proclamations numbered 643 and 644 and notice 670.
The preemptors have forfeited their rights to the several
28 tracts claimed by them, as decided by the honorable Secretary of the Interior in his decision of November 3rd, 1856, in the case of Frank Pickler, Homestead Entry 2862, a copy of which decision was transmitted to you in my letter of the 8th inst."

And thereafter said Randall applied to have his said entry rein- 82
stated, which application was denied by the Secretary of the Interior March 27, 1886, for the reason as given by him that "said tracts having been certified to said State for the benefit of said company, this Department has no further jurisdiction over the same. Whatever rights the applicants may have must be decided by the courts of the country when attacked, or when they may choose to assert the same." (S. M. Ry. Co. vs. Kuffer, 2 Land Dec., 492; Wis. Cent.

R. R. Co. vs. Stinka, 4 Land Dec., 344; Moore vs. Robbins, 6 Otto,
83 530; Frasher vs. O'Connor, 115 U. S., 102.)

But the complainant does not admit by this stipulation that said cash entry was properly cancelled.

5. That each and every of the acts of Congress and of the Territory or State of Minnesota, referred to in the pleadings herein, and the decisions and opinions purporting to have been made and delivered by the Secretary of the Interior or Commissioner of the General Land Office of the United States, reported in the "Decisions of the Department of the Interior relating to Public Lands," may be used upon the hearing of this cause, so far as the same may be rele-
84 vant to the issues herein, in any court in which it may be pending, without further proof thereof.

6. That the said State of Minnesota conveyed the tract of land in controversy by quitclaim deed at the time stated in the
29 answer herein to defendant railroad company, and said defendant railroad company on the 22nd of November, 1881, conveyed said tract by quitclaim deed, expressing a consideration of $600, to one Washington Boright, which deed was duly recorded
85 in the office of the register of deeds in said Le Seuer County on April 17th, 1882; and said Washington Boright, on the 17th of April, 1882, conveyed said land by quitclaim deed, expressing a consideration of $800, to L. Quackenbush, which deed was duly recorded in said county April 19th, 1882, and a copy of which is hereto attached, marked Exhibit "A," and said L. Quackenbush conveyed said land to John Kapiska by deed with full covenants of warranty, expressing a consideration of $1,300.00, on the 13th of June, 1882, which deed was duly recorded in said county June 19th,
86 1882; and said John Kapiska and wife conveyed said land to Hermann Kapiska by warranty deed, expressing a consideration of $500.00, on April 13th, 1888, which deed was duly recorded in said county July 5th, 1889; and said Herman Kapiska and wife duly conveyed said land to Alfred J. Moler by deed with full covenants of warranty, expressing a consideration of $2,900.00, on the 19th day of May, 1891, which deed was duly recorded in said county on the 9th day of June, 1891.

7. That on the 18th day of January, 1882, said Boyd W. Randall being then in possession of said land and claiming to be the
87 owner thereof, and as such to have legal right to the possession thereof, the said Washington Boright commenced an action of ejectment against him in the district court of the State of Minnesota in and for the county of Le Sueur for the possession of said land,
30 and the said court having jurisdiction of the subject-matter of the action and the parties thereto such proceedings were had in said action that on the 4th of March, 1882, it was by said
88 court held, determined, and adjudged that the plaintiff, said Boright, was, and that the defendant, said Randall, was not, the owner of said land; that said Randall was wrongfully in possession of the same and wrongfully withheld the same from the plaintiff, and that said Boright recover of said Randall the possession thereof and damages for the use and detention of the same, from which judg-

ment no appeal was taken, and the same has never been reversed, but is now in full force and effect. That in accordance with and upon said judgment execution was issued out of said court to the sheriff of said county on the 4th of March, 1882, commanding him to deliver possession of said land to said plaintiff, and in pursuance 89
of said execution said sheriff did, on the said 7th day of March, 1882, turn said Randall out of possession of the said land, and did then and there deliver the possession thereof to the said plaintiff; and ever since the said defendant Boright and those holding under him have been in the possession of said land, claiming to be the owners thereof.

8. That said defendant, the St. Paul & Sioux City Railroad Company, within the time and in the manner specified and required by the laws of the United States and the State of Minnesota, built, 90
equipped, and put into operation its said line of road past the lands in question and throughout its entire length, except that portion of the same from St. Anthony via Minneapolis to Shakopee, west of the Mississippi River—which portion has never been built—
31 and thereby became entitled to all the lands granted in aid of such line as so constructed.

9. That when said act of May 12th, 1864, was passed there were not remaining unsold or to which the right of preemption or home- 91
stead had not attached sufficient lands in the alternate odd-numbered sections within twenty miles of said line of road to fill the additional grant of 1864 for that part of the line so constructed as aforesaid.

10. That on, before, and for a long time after the certification of the land in question to the State on account of said railroad grant, and until after the year 1879, it was uniformly held and ruled by the Secretary of the Interior and other officers of the Land Department of the United States that a preemption claim in all respects valid existing at the time of the attachment of the railroad grant, 92
if subsequently abandoned or not consummated, would not operate to defeat the grant. And in pursuance of and in accordance with the aforesaid rule the grants to and for each and all the land grant railroad companies in the State of Minnesota were before, at, and for a long time after the year 1879 administered.

11. That the St. Paul & Sioux City Railroad Company, this defendant, by the name of the Minnesota Valley Railroad Company, was authorized and empowered by the laws of the Territory and State of Minnesota to build, equip, and put into operation a line of 93
railroad from St. Paul and from St. Anthony via Minneapolis to a point of junction from Shakopee City, in the county of Scott, via Belle Plaine, Clarksville, Le Sueur, Traverse de Sioux, St.
32 Peter, Kasota, and South Bend, to the southern boundary of the Territory of Minnesota, in the direction of the mouth of the Big Sioux River—being the line of road in question—and the said Territory and State of Minnesota granted to and conferred 94

upon said railroad company all the lands granted by Congress to aid in the building of said line of road.

12. That notwithstanding the stipulation of fact herein made, either party hereto may take such further testimony as to them may seem proper as to any of the matters in controversy in this suit.

13. That when L. Quackenbush and wife conveyed said land to John Kapiska, viz, July 13th, 1882, said Kapiska executed and delivered to said Quackenbush a mortgage to secure $1,075.00 of the sum which he agreed to pay for said land; that said mortgage
95 was satisfied of record and fully paid on the 24th day of February, 1887, and that said Kapiska had from time to time paid the same, and that the last payment was made thereon at the last-named date.

14. That before the quitclaim deed was made by the defendant railroad company to the land in question to Washington Boright, November 22nd, 1881, that company had conveyed to said Boright, the land in question by a warranty deed, which was sent for record by him to the register of deeds of Le Sueur County (that being the county in which said lands lie), and was in some way mislaid or
96 lost, and on account of such loss said Boright applied to the railroad company for a quitclaim deed, which was given him, and which is the deed above referred to, dated November 22nd, 1881.

33 15. That each and every of the matters herein stipulated is subject to any objection that may be made by either party on the ground that it is incompetent, irrelevant, or immaterial.

Dated St. Paul, August 5th, 1893.

97 ROBT. G. EVANS,
Of Counsel for Complainants.
WILSON & BOWERS,
Solicitors for Defendants.

[Title of cause.]

Stipulation as to interrogatories and cross-interrogatories.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action, that the interrogatories and
98 cross-interrogatories, attached hereto, may be answered by the officers to whom they are addressed; and such answers when signed by them shall be attached to said interrogatories and cross-interrogatories, and together therewith filed with Wm. A. Spencer, esq., clerk of the United States district court, St. Paul, Minnesota, the master taking the testimony in said cause, and by him shall be certified to the above court, with the other evidence taken before him, as a part of the testimony in said cause, and that said interrogatories, and the answers thereto, shall be received in, and consid-
99 ered as evidence, in said cause, as fully, and with the same effect, as if the testimony of said witness had been regularly and duly taken under and pursuant to the rules of said court.

Provided, that either party may object to any answer or statement, that the same is not responsive, or that it is incompe-
34 tent, irrelevant, or immaterial, or that any interrogatory or cross-interrogatory has not been fully or fairly answered.

August 19th, 1893.

ROBT. G. EVANS, 100
Special Asst. United States Attorney, of Counsel.

WILSON & BOWERS,
Attorneys for Defendants.

Interrogatories propounded by the complainant to the Commissioner of the General Land Office. 101

1. State your name and the official position now held by you.

2. State whether or not the several railroad land grants made by the Congress of the United States are administered in the department of which you are the head, and whether such department has charge of the certification and patenting of lands under the land grants aforesaid, and the adjustment and final closing of all such grants.

3. Are you familiar with the history and condition of the various 102
grants of land in the now State of Minnesota made by Congress in aid of building certain lines of railroad in said State, and in the Territory of Minnesota, of which the Saint Paul and Sioux City
35 Railroad Company, one of the defendants in the above-entitled cause, is now the beneficiary?

4. If your answer to the above interrogatory (number 3) is in the affirmative, state whether or not the said grants, or either of them, of which the St. Paul and Sioux City Railroad Company is now the 103
beneficiary, have ever been adjusted; and if so, state when such adjustment was made, and which of said grants have been so adjusted, and how.

Cross-interrogatories propounded by counsel for defendants.

1. If you answer the second direct interrogatory in the affirmative, state when you became the head of such department, what you mean by the word "administered," and what you mean by the expression "the adjustment and final closing up of all such grants"— 104
state particularly and fully.

2. If you answer the direct interrogatory No. 3 in the affirmative, state fully and particularly all your knowledge and means of knowledge of the matters referred to in that interrogatory and how and when you gained such knowledge.

3. If you answer the direct interrogatory No. 4, state fully and particularly all your knowledge and means of knowledge of the subject-matter referred to in that interrog'ory, and when and how you acquired the same, and what you mean by "adjusted." State 105
also fully and particularly what land grants in aid of other lines of railroad, if any, have been "adjusted," in the sense in which you used that term, and when and how, and the names of such
36 roads and the dates of such grants. State also how many and what other land grants remain "unadjusted," in the sense in

which you use that term, and the names of such roads and the dates of such grants, and give a list of all the lands applied for by and
106 all the lands certified to the St. Paul and Sioux City Railroad Company, east of the west line of range 38, within the last ten years, and when they were applied for and when certified and within what limits.

4. State whether you have any personal knowledge of the matters to which you have testified, or whether you have testified in whole or in part from information gained by or from the files or records of your office. If, aside from the information gained from such files or records, you have any personal knowledge of any of the facts or
107 matters to which you have testified, specify particularly the facts or matters of which you have such personal knowledge.

Answer of Commissioner of General Land Office.

I, S. W. Lamoreaux, being duly sworn, upon my oath say and depose, in answer to the interrogatories and cross-interrogatories propounded to me and attached hereto in the above-entitled cause:

1st. In answer to interrogatory number 1, my name is S. W. Lam-
108 oreux, and my official position is that of Commissioner of the General Land Office.

2nd. In answer to interrogatory number 2, I will state that all land grants made by Congress to aid in the construction of railroads are administered by this bureau of the Department of the
37 Interior, under the supervision and direction of the Secretary of the Interior, including the certification and patenting of land on account thereof and the adjustment and final closing of such grants.

109 3rd. In answer to interrogatory number 3, I will state that my information in regard to land grants to aid in the construction of railroads is gained from information furnished me by those in charge of the records and files of this office pertaining to such grants, such persons having, by long service, become familiar therewith and on whom I rely.

4th. In answer to interrogatory number 4, I will state that the records of this office fail to show that any adjustment was ever made either of the grant of March 3, 1857, or May 12, 1864, under which the St. Paul and Sioux City Railroad is the beneficiary prior
110 to the passage of the adjustment act of March 3, 1887.

5th. In answer to cross-interrogatory number 1, I will state that I became Commissioner of the General Land Office March 29, 1893, and by the word "administered," as here used, is meant conducted, executed, giving effect to, carrying out the intention of Congress as construed by this Department and the courts, and by the expression "the adjustment and final closing of all such grants," is meant the full administration and settlement thereof which has received the approval of this Department.

111 6th. In answer to cross-interrogatory number 2, I will state that this interrogatory is fully answered in my answer to direct interrogatory number 3.

7th. In answer to cross-interrogatory number 3, I will state that my only means of knowledge is that disclosed by the records
38 of this office and the information given me by those having charge of such records, and by "adjusted," as applied to land grants, is meant closed in the manner stated in my answer to cross-interrogatory number one.

I will further state that none of the land grants within the State 112
of Minnesota appear to have ever been adjusted or closed.

During the last 10 years the St. Paul & Sioux City R. R. Co. has applied for the following lands within the limits of its grant east of the west line of range 38 W., to wit:

January 30, 1885: SE. ¼ NW. ¼ sec. 35, T. 114 N., R. 25 W. Held for cancellation February 3, 1890.

March 15, 1887: S. ½ SE. ¼, sec. 29, T. 101 N., R. 38 W.; NW. 113
¼ NE. ¼ sec. 33, T. 101 N., R. 38 W.; NW. ¼ sec. 33, T. 101 N., R. 38 W.

Upon these selections no action appears to have been taken except as above stated.

During said period no lands appear to have been certified or patented on account of said grant east of range 38 W.

8th. In answer to cross-interrogatory number 4, I will state that I have no other knowledge of the matters to which I have testified than such as has been gained from the records of this office or furnished me by those having charge of such records. 114

Duly subscribed and sworn to.

39 *Interrogatories propounded by the complainant to the chief of the division of the General Land Office having in charge the administration of railroad land grants.* 115

1. State your name and the official position now held by you.

2. State whether or not the several railroad land grants made by the Congress of the United States are administered in the division of which you are the head, and whether such division has charge of the certification and patenting of lands under the land grants aforesaid, and the adjustment and final closing of all such grants.

3. Are you familiar with the history and condition of the various grants of land in the now State of Minnesota made by Congress in 116
aid of building certain lines of railroad in said State and in the Territory of Minnesota of which the Winona and St. Peter Railroad Company, one of the defendants in the above-entitled cause, is now the beneficiary?

4. If your answer to the above interrogatory (number 3) is in the affirmative, state whether or not the said grants, or either of them, of which the St. Paul and Sioux City Railroad Company is now the beneficiary, have ever been adjusted, and if so, state when such adjustment was made, and which of said grants have been so 117
adjusted, and how.

40 *Cross-interrogatories propounded by counsel for defendants.*

1. If you answer the second direct interrogatory in the affirmative, state when you became the head of such division, what you 118

mean by the word "administered," and what you mean by the expression "the adjustment and final closing up of all such grants;" state particularly and fully.

2. If you answer the direct interrogatory No. 3 in the affirmative, state fully and particularly all your knowledge and means of knowledge of the matters referred to in that interrogatory and how and when you gained such knowledge.

3. If you answer the direct interrogatory No. 4, state fully and particularly all your knowledge and means of knowledge of the sub-
119 ject-matter referred to in that interrogatory, and when and how you acquired the same, and what you mean by "adjusted." State also fully and particularly what land grants in aid of other lines of railroad, if any, have been "adjusted," in the sense in which you used that term, and when and how, and the names of such roads and the dates of such grants. State also how many and what other land grants remained "unadjusted," in the sense in which you use that term, and the names of such roads, and the dates of such grants, and give a list of all the lands applied for by and all the lands cer-
120 tified to the St. Paul and Sioux City Railroad Company, east of the west line of range 38, within the last ten years, and when they were applied for, and when certified, and within what limits.

4. State whether you have any personal knowledge of the
41 matters to which you have testified, or whether you have testified in whole or in part from information gained by or from the files or records of your office. If, aside from the information gained from such files or records, you have any personal knowl-
121 edge of any of the facts or matters to which you have testified, specify particularly the facts or matters of which you have such personal knowledge.

Answer of W. J. McGee, chief of division.

I, W. J. McGee, being duly sworn, upon my oath say and depose in answer to the direct and cross interrogatories propounded to me and attached hereto in the above-entitled cause:

122 1st. In answer to direct interrogatory number one, my name is William J. McGee and my official position is that of chief of the railroad division of the General Land Office.

2nd. In answer to direct interrogatory number two, this division administers all land grants made by Congress to aid in the construction of land grant railroads, certifies and patents lands thereunder, and adjusts and finally closes all of such grants, under the supervision and direction of the Commissioner of the General Land Office and the Secretary of the Interior.

123 3rd. In answer to direct interrogatory number three, I will state that my knowledge of the grant by Congress to aid in the construction of the railroad known as the St. Paul and Sioux City Railroad has been gained from personal examination of the files and records of this office relating thereto and from information furnished
42 me by persons who, from long service in the General Land Office, have become familiar therewith.

4th. In answer to direct interrogatory number four, the records of this office fail to show any adjustment, either of the grant of 124
March 3, 1857, or May 12, 1864, under which the St. Paul and Sioux City Railroad Company is the beneficiary, to have been made prior to the adjustment act of March 3, 1887.

Cross-interrogatories.

1st. In answer to cross-interrogatory number one, I became chief of the railroad division June 16, 1893, and by the word "administers" as here used is meant construes, executes, gives effect to, and carries out the intention of Congress as interpreted by this Department and the courts; and by the expression "the adjustment and 125
final closing of all such grants" is meant the full administration and settlement thereof approved by this Department.

2nd. In answer to cross-interrogatory number two, said interrogatory was fully answered in my answer to direct interrogatory number three, excepting as to the time of acquiring the information which has been acquired since my appointment as chief of this division.

3rd. In answer to cross-interrogatory number three, my only means of knowledge are the records of this office and the informa- 126
tion given me by those familiar with the history of the various grants through long experience in the General Land Office.

By adjusted, as applied to land grants, is meant closed, in the
43 manner stated in my answer to cross-interrogatory number one. Further, none of the land grants within the State of Minnesota appear to have been adjusted or closed.

During the last 10 years the St. Paul and Sioux City R. R. Co. 127
has applied for the following lands within the limits of its grant east of the west line of range 38 W., to wit:

January 30, 1885: SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 35, T. 114 N., R. 25 W. Held for cancellation February 3, 1890.

March 15, 1887: S. $\frac{1}{2}$ SE. $\frac{1}{4}$ sec. 29, T. 101 N., R. 38 W.; NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 33, T. 101 N., R. 38 W.; NW. $\frac{1}{4}$ sec. 33, T. 101 N., R. 38 W.

Upon these selections no action appears to have been taken, except as above stated. 128

During said period no lands appear to have been certified or patented on account of said grant east of range 38 W.

4th. In answer to cross-interrogatory number four, I have no other knowledge of the matters to which I have testified than such as have been gained from the records of this office or furnished me by clerks of this division who are familiar therewith.

Duly subscribed and sworn to.

Complainant's Exhibit A.

W. J. M.

"F." DEPARTMENT OF THE INTERIOR, 129
C. H. B. GENERAL LAND OFFICE,
August 29, 1893.

I, S. W. Lamoreux, Commissioner of the General Land
44 Office, do hereby certify that the records of this office show

that selections of land were pending before this office March 3, 1887, made by the St. Paul & Sioux City Railway Company for the tracts hereinbelow described, on the dates there indicated, in
130 relation to which selections action has been taken by this office and said company subsequent to March 3, 1887, as shown by the following statement, viz:

Parts of section.	S.	T.	R.	Dates of selection.	Dates and character of action.
		N.	W.		
SW. ¼	24	105	43	June 22, 1876	Held for cancellation by decision of March 16, 1893. Appealed by company and sent to Secretary Aug. 19th, 1893.
S. ½ NW. ¼ and lots 3 and 4.	4	104	41	Apr. 3, 1877	Cancelled by office July 1, 1891.
131 SW. ¼	4	104	41	.....do	Cancelled by office November 20, 1890.
SE. ¼	6	104	41	.....do	Cancelled by office February 28, 1890.
SE. ¼ NW. ¼	35	114	25	Jan. 30, 1885	Held for cancellation by decision of Feb'y 3, 1890. Cancelled June 1, 1891.

That on March 15, 1887, said company selected the S. ½ SE. ¼ of sec. 29, T. 101 N., R. 38 W.; NW. ¼ NE. ¼ sec. 33, T. 101 N., R. 38 W.; and NW. ¼ sec. 33, T. 101 N., R. 38 W., upon which selections no action has been taken by this office.

That it is also shown by the records and files of this office that the
132 said St. Paul and Sioux City Railway Company applied May 17th, 1893, to select the SE. ¼ sec. 25, T. 109 N., R. 35 W., and appealed from the decision of that date by the district land officers at Marshall, Minnesota, denying said application, and that said application and appeal are now pending in this office.

45 August 4, 1893, said company filed in the district land office at Marshall, Minnesota, its selection of the NW. ¼ NW. ¼ sec. 29, T. 104 N., R. 34 W., which was approved by the
133 district land officers and is now under consideration by this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMOREUX,
Commissioner of the General Land Office.

Defendant objects to the foregoing certificate on the ground that the facts therein stated are incompetent, irrelevant, and immaterial, but not on the ground that the same is not the best evidence.

134 *Evidence.*

TESTIMONY OF BOYD W. RANDALL.

BOYD W. RANDALL, being first duly sworn and examined on behalf of complainant, on direct examination testified as follows:

Q. What is your name?
A. Boyd W. Randall.
Q. Age?
A. Fifty-seven.

Q. Where do you live?
A. In Sharon.
Q. In Le Sueur County, this State?
A. Yes, sir. 135
Q. In the same town since 1856?
A. Yes, sir.
46 Q. Do you know the land described as the south half of the northeast quarter of section 29, town. 111, range 25, in Le Sueur County?
A. I am acquainted with it some; yes, sir.
Q. State whether or not you occupied that land at any time. 136
A. I did.
Q. When did you first go upon that land to live upon it?
A. The first day of August, 1856.
Q. Will you state, Mr. Randall, what you went upon this land for?
A. To make me a home.
Q. What, if anything, did you do in the way of improving the property?
A. I cleared this timber land. It was timber land I was clearing.
Q. Commenced the work of clearing right away, did you, that 137 same season?
A. That fall; yes, sir.
Q. You commenced clearing the same fall, you say?
A. Yes, sir.
Q. Did you stay upon the land that winter?
A. I did part of the time.
Q. Did you build a house on it?
A. I did.
Q. When was that house built?
A. That house was built that same fall of 1856.
Q. From that time, the first of August 1856, how long did you continue to live upon and improve the land? I don't care for the 138 exact date.
A. Until I was put off from the place.
Q. By whom?
47 A. It was by the sheriff, the deputy sheriff, Aleck Rapp.
Q. Did you live upon this land all the time from the time you went on it in 1856 until put off by this sheriff? 139
A. I wasn't living on it quite all of the time, I was working out some of the time until I could get means to live on.
Q. Did you have a house upon it all the time?
A. I built a house upon it in 1856.
Q. For how long a period at a time were you off from the premises?
A. I don't know; not a great while; just a short time.
Q. Well, for as much as six months at any one time?
A. No; I wasn't off that long.
Q. For as much as three months?
A. I might possibly have been off that long once or twice, not more than that. 140
Q. I wish to call your attention, Mr. Randall, to the fact of your being in the army. You were away from the land during the time of your service in the army?

A. Yes; of course.
Q. In what year?
A. 1862 and 1863.
Q. And for how long a time?
A. I was in the service for eleven months.
Q. And you were away from the land during that time? Upon your discharge from the army, did you return immediately to this land?
141 A. Very soon.
Q. And continued to live there after that time down to the time you were put off?
A. Yes, sir.
48 Q. Did you cultivate a crop each year during this time?
A. I did.
Q. Upon this land?
142 A. I did.
Q. Did you cultivate a crop upon the land from 1856 to 1862, each year before you went into the army?
A. I think I did.
Q. When you were put off from the land, do you know who claimed to be the owner of the property; at whose suit you were put off; do you know at whose suit it was that you were evicted from the land, Mr. Randall?
A. Boright.
Q. Washington Boright?
A. Washington Boright.
143 Q. Did you know Washington Boright prior to the time, before the time that you were put off from there?
A. No, sir.
Q. Had no acquaintance with him?
A. Very little, I guess.
Q. Did you know him by sight?
A. No, sir.
Q. Do you know where Boright lived?
A. In Le Sueur somewhere; in Le Sueur here.
Q. This town?
A. Yes, sir.
Q. And did live here, do you know, how long before the suit was?
144 A. I do not.
Q. You may state whether, after you went upon that land and commenced clearing, you made any de*de*claratory statement as to your intention as to that land.
49 By Mr. WILSON. I object to this as incompetent, irrelevant, and immaterial, and not the best evidence.
Q. Whether you went to any land office and made your statement
175 there of what you intended to do about this land?
A. Before I was put off from it?
Q. The same year that you went on the land?
A. Yes.
Q. You remember when that was done; don't care about the exact date.

A. I did not.

By Mr. WILSON. I object to this suggesting.

Q. Was it the same year that you went upon the land that you made your statement?

A. I don't remember just what time it was, of course.

Q. Well, what is your best recollection about the matter? 176

A. Well, of course, I filed on it that same fall.

Q. That same fall of 1856?

A. Yes, sir.

Q. And where?

A. At Red Wing.

Q. At the land office there?

A. Yes, sir.

Q. What else did you do in the way of getting title to this land at any time?

A. I proved up on it.

Q. When was that? 177

By Mr. WILSON. I object to this as incompetent, irrelevant, and immaterial, and not the best evidence, there being record of evidence of the fact, if it be a fact.

Q. You can go on, Mr. Randall. You remember when it was that you proved up on it?

50 A. No, I do not.

Q. From the time that you went onto this land in 1856, Mr. Randall, until you were put off, as you have stated, will you state whether you claimed to be the owner of the land? 148

By Mr. WILSON. Object to that as incompetent, irrelevant, and immaterial.

A. I did, of course.

Q. You cultivated it as your own?

A. I did.

Q. During all this time you lived upon the land with your family, did you?

A. No; not all that time; I didn't since I took the claim; I wasn't married at that time.

Q. When were you married?

A. 1864.

Q. Prior to 1864 did you live there yourself? 149

A. A good part of the time, as I told you a while ago; not all the time; there was eleven months of the time that I was in the army; of course, I wasn't living on it then.

Q. During all that time, state whether or not you regarded this as your home?

A. I did.

Q. Mr. Randall, do you know John Kapiska?

A. I have seen him.

Q. Do you remember—state whether or not you did have a conversation with Mr. Kapiska about this land shortly after you were evicted from it? 150

A. Yes.

Q. You will state what was said in that conversation between you and Kapiska.

A. Well, I told him I met him on the road, and I told
51 him to leave the cord wood alone that was chopped there on the place; it was mine, and I forbid him going on the place to take possession.

Q. You told him that the wood was yours or the place was yours, which?

151 A. Both.

Q. Do you remember how long after you had been put off this was?

A. I do not exactly.

Q. Was it the same spring?

A. Yes.

Q. Will you give your best recollection as to the time when this conversation was—as near as you can remember, that is?

A. It was that same spring that we was put off from the place.

Q. That is as near as you can fix it, is it?

152 A. It is.

Q. Did you ever have any other talk with him about this matter?

A. No.

Q. Was this conversation on the place?

A. No.

Q. Where was it?

A. It was near the place.

Q. What led to the conversation—how did you happen to have it?

A. I had been over on the place and was coming away, and I met him on the way and I told him about the land and about the place.

153 Q. What did he say?

A. He said for me to fight with Quackenbush; he had nothing to do with me.

Q. Who was Quackenbush?

A. I believe he was a banker here in Le Sueur.

52 Q. Did you know whether Quackenbush had any connection with the land or not?

A. I don't know as I could swear positively.

Q. What did you know about him at the time?

154 A. Nothing only from hearsay?

Q. Do you know Herman Kapiska?

A. I am a little acquainted with him.

Q. How long have you known him?

A. I hadn't known him a great while.

Q. Did you ever have any conversation with him about this land?

A. I had a little.

Q. What was that conversation?

A. Well, I suppose that I have got to commence at the first of that. I was coming to Le Sueur here quite a while back and overtook him; I had a team and he was afoot and I overtook him and
155 asked him to get in and ride. He got in and rode with me and was coming on down and I asked him his name; of course he

didn't give me the right name at all, and he was asking me if I didn't have a claim on a piece of land there, up there in the timber. I told him that I had had, but had been put off. He wanted to know if I thought I would get the land again. I told him I did. We had been working for it and I thought we would get it.

Q. Nothing more?

A. Well, he said that we ought to have the land, he said.

Q. Anything else?

A. I guess not. 156

Q. When was that conversation, Mr. Randall?

A. Well, now, I don't know as I can say; some four years ago probably.

Q. Do you remember at what season of the year it was?

53 A. I don't know as I do. I think it was in the fall, though.

Q. Do you know who was in possession of this land at the time of this conversation?

A. No; I don't know whether I do, unless Kapiska was. 157

Q. This Kapiska, or the other one?

A. John, I guess.

Q. What is Herman Kapiska—what does he do—what is his business?

A. He owns a sawmill now, I believe.

Q. Here in Le Sueur?

A. No; out on Rice Lake.

Q. Do you know Alfred J. Mohler?

A. Never seen him.

Q. How long have you been acquainted with him?

A. Three or four year; four maybe.

Q. Is the party now in possession of this land? 158

A. I believe he is.

Q. Did you ever have any conversation with him regarding it?

A. No, sir.

Cross-examination by Mr. WILSON:

Q. Where have you lived the last ten or twelve years?

A. Probably twelve year ago I was living on the place.

Q. Where have you lived ever since? 159

A. Well, in different places, but all in Sharon, though.

Q. In Le Sueur County?

A. All in the town of Sharon, in Le Sueur County.

54 Q. All the time since then you have been living in the same township in which this land is?

A. Yes, sir.

Q. And how close to it?

A. Well, the closest, I guess, would be a mile and a half, proba- 160 bly, that I have lived to it.

Q. How long did you live there?

A. I can't say.

Q. About how long, to the best of your recollection?

A. Probably eight months.

Q. Well, how far have you lived from it at any one time in the last ten years?

A. About six mile, I should think, was the farthe*r*est.

Q. How long did you live there?

161 A. I can't say.

Q. The best of recollection that you have, give us.

A. Near twelve months.

Q. Near twelve months, the most of the time you lived within from one to three miles?

A. From one to six miles.

Q. Well, say, most of the time from one to three miles, didn't you?

A. Yes.

Q. You say you had a conversation with John Kapiska?

A. A few words.

162 Q. A few words. When?

A. I don't know whether it was in 1882 or 1883.

Q. What month of the year.

A. I can't say.

Q. Who was with you?

A. My woman.

55 Q. Nobody else?

A. I guess not; no, sir.

Q. What time of day was it?

A. I don't know.

163 Q. Now give us every word that you said to him and that he said to you, in the order in which it was said as nearly as you can recollect.

A. Well, I met him on the road between near my place, there, that is where we met; he was going in toward my place; I was coming out from my place; I told him that I wanted him to leave the wood alone there on my place and also to leave the place alone; it was my place; he said he hadn't anything to do with me; he said for me to go and fight mit Quackenbush. That is the Dutch of it, I suppose.

Q. Is that all?

164 A. I guess.

Q. That was said?

A. That I remember.

Q. How long was this after you had been turned off by the sheriff?

A. Probably less than two years.

Q. Would you be sure?

A. I don't know that I would.

Q. How long had Kapiska been living on this place before you had this conversation with him?

A. I don't know as he lived there at all.

Q. Do you know how long, or whether he had been living on it before this conversation?

165 A. I don't think I do.

Q. Do you know?

A. No.

Q. Do you know how long it was after he had bought the place from Quackenbush?

56 A. No.

Q. You don't know how long it was?

A. I do not.

Q. Did he tell you he had bought it from Quackenbush? 166

A. I do not know as he did.

Q. Do you know he didn't?

A. No; I don't know he didn't.

Q. That is the only conversation you ever had with him?

A. All I remember of.

Q. When had you the conversation with Herman Kapiska?

A. A few year ago.

Q. Give us the time as nearly as you can recollect?

A. Somewhere between three and four year, probably.

Q. Would you swear that it was between three and four years 167 ago?

A. No.

Q. You would not?

A. I don't know as I would.

Q. Well, can't you give us any more closer than that?

A. No.

Q. Who was with you when you had that conversation with Herman Kapiska?

A. Nobody; only Herman and myself.

Q. What season of the year was it?

A. I don't know.

Q. And you don't know what year? 168

A. No, I told you I didn't; three or four years ago.

Q. Now, just repeat over to the best of your recollection every word that you said to him and that he said to you at that conversation, just as it was said.

57 A. Well, when I overtook him on the road—that is what you want me to?

Q. I want you to give every word that you said to him and that he said to you at that conversation as nearly as you recollect; every word that you said to him and that he said to you, and the order in 169 which it was said, as nearly as you can recollect.

A. Well, I asked him to get in with me in the wagon. He got in and rode with me on down to town. I asked him his name, and he gave me a name; but not the right name, of course.

Q. What name did he give you?

A. I don't know as I could tell exactly; Williams or Williamson—something like that. I don't remember just what it was.

Q. Well, go on.

A. He asked me if I didn't own a piece of land up here, and I 170 told him that I had, but we had been put off of it, but we was trying to get it back again; and he said that he was in hopes that we would get it back again, and I told him that I thought that we would.

Q. That is all that was said?
A. I believe it is.
Q. Would you be sure that that was as long ago as three years?
A. I think it was between three and four years, I said.
Q. I say, would you be sure that it was as long ago as between three and four years?
171 A. No.
Q. Do you know who was living on the land then?
A. I do not.
Q. You know what improvements Kapiska put on the land?
58 A. I do not.
Q. Don't know anything about that?
A. I don't.
172 Q. How near were you living to that land when you had that talk with Herman Kapiska?
A. I don't know.
Q. How near were you living to it when you had the talk with John Kapiska?
A. Probably two miles.
Q. You paid the taxes on this land, I suppose, all the time since you preempted it?
By Mr. FAIRCHILD. Object to that as incompetent, irrelevant, and immaterial, and not cross-examination.
A. No; I didn't.
Q. How many years did you ever pay taxes on it?
By Mr. FAIRCHILD. Same objection.
173 A. Don't know as I paid any taxes on it.
Q. Don't you know that you never paid taxes on it one year?
A. I said that I didn't know that I did.
Q. Don't you know that you didn't, I say?
A. No; I didn't pay any taxes on it.
Q. Did you observe whether it was sold for taxes?
By Mr. FAIRCHILD. Same objection.
A. I don't know.
Q. You don't know whether you did or didn't?
A. No.
Q. Do you know how long John Kapiska—I mean Herman Kapiska—about how long Herman Kapiska cultivated and lived
174 on this land?
A. I do not.
Q. Don't you know about how long?
A. I don't.
Q. You don't know how much—what buildings he put on it?
59 A. I don't.
Q. Don't know how much he improved it?
A. I haven't been there for several years.
Q. You don't know how much he improved it?
175 A. I don't.
Q. Do you know how long Mohler had lived on it?
A. I don't know that he has lived on it at all.
Q. How near to it does he live?

A. Can't say. I can't say.
Q. Do you know?
A. I don't know where he lives now.
Q. Don't you know whether he had lived right close to that land or not?
A. I don't think he lived right close to it.
Q. You don't?
A. I don't.
Q. How many acres of land are there in this piece in dispute? 176
A. Eighty acres.
Q. Don't you know that Mr. Mohler has a house on a piece of two acres just adjoining it?
A. No; I don't.
Q. The man that works it for Mr. Mohler—don't you know that the man that works it for Mr. Mohler—don't you know that he lives just adjoining it?
By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial, and not cross-examination.
A. I don't know.
Q. You don't know? 177
A. No; I don't know as he has rented the land.
Q. Well, don't you know that the man that is working the place for the past few years lives right close adjoining it?
By Mr. FAIRCHILD. Same objection.
60 A. Probably he does.
Q. Don't you know?
A. No; I don't.
Q. Well, why do you say "Probably he does?"
A. I don't know what man has it rented now. 178
Q. I said to you: "Don't you know that the man that works that place lives right close to it?"
By Mr. FAIRCHILD. Same objection.
A. Yes.
Q. How close to it?
By Mr. FAIRCHILD. Same objection.
A. A few rod.
Q. How many rod?
By Mr. FAIRCHILD. Same objection.
A. Not over ten.
Q. Not over ten?
A. I guess not. 179
Q. What improvements are there on this place?
A. I don't know.
Q. Don't you know?
A. I haven't seen the place for several years.
Q. How do you know that the man that works this place lives within ten rods of it, then, if you haven't seen it for several years?
A. I heard them say that he lived there close by.
Q. Within ten rods of it. Did you hear them say that?
A. No.

180 Q. How do you come to answer me that he lives within ten rods of it?

A. The last time I was there there was a house close to it, and all the one that I knowed was there. That is the reason I said within ten rods.

Q. When was that?

61 A. I don't know.

Q. About when?

A. I don't know as I can say.

181 Q. About how many years ago—your best recollection?

A. That he had been living in the house?

Q. That you were there and saw that house there.

A. Probably been in the house six years.

Q. I am not asking you that he has probably been in the house six years; I asked you how long ago it was that you were there and saw that house there.

A. Six years, then.

Q. It is as long as that, is it?

A. Yes.

Q. Do you swear you haven't seen that place within six years?

182 A. The place that I claim I haven't seen for six years.

Q. Well, where this house is?

A. I have seen that land.

Q. Yes.

A. Yes; I have seen that land, but I haven't seen the house. The house is not right on the road.

Q. How long since you have seen the land?

A. Seen the land last fall.

Q. The land is close to the road?

A. It is right on the road—part of the land.

Q. What improvements were there on the land the last time you

183 saw it?

A. The land where that house is is the one you are speaking of?

Q. I am speaking of this eighty acres of land that you claim the right to.

A. There is some twenty acres in cultivation.

62 Q. Give us all the rest of the improvements. Isn't there about fifty acres in cultivation?

A. I don't know.

Q. You don't know?

184 A. I don't know.

Q. Would you swear that there isn't?

A. I wouldn't swear how many acres there is.

Q. Isn't there a nice barn on it?

A. I don't know anything about it; I haven't seen it.

Q. A fine granary on it?

A. I haven't seen any nice granary there.

Q. Would you swear there isn't?

A. No.

Q. Well, when you saw the land wouldn't you see the barn and granary if there was one?

A. I couldn't see all over the eighty acres and I wasn't all over it. 185
Q. And you couldn't see it from the road, could you?
A. That land don't lay within a quarter of a mile of the road.
Q. You couldn't see the buildings on it?
A. Of course not; there is timber between it and the road.
Q. Now, you swear that a person going along the road there couldn't see it?
A. I couldn't, I said.
Q. It is about how far from the road?
A. Eighty rods. 186

Redirect examination by Mr. FAIRCHILD:

Q. Your eyesight is somewhat defective, is it, Mr. Randall?
63 A. Yes, sir.
Q. How long has it been so?
A. I always was somewhat nearsighted.
Q. Is that the only trouble with your eyesight—nearsightedness? 187
A. I had inflammation of the eyes when I was in the army.
Q. Did that affect your sight any further?
A. Yes, sir.
Q. Impaired it still more?
A. Yes, sir.
Q. How much can you see now?
A. I don't know; not a great deal.
Q. Can you see to recognize a man across the street?
A. No, sir.
Q. Across the room? 188
A. No, sir.

Mrs. RANDALL sworn for complainant.

Examined by Mr. FAIRCHILD:

Q. What is your full name, Mrs. Randall?
A. Nancy Jane Randall.
Q. You are the wife of the last witness?
A. I am.
Q. You were married to him, as he states, in 1864?
A. Yes, sir; March the 2nd, 1864.
Q. You have lived together as husband and wife since that time?
A. We have. 189
Q. Do you know Washington Boright?
A. I know him by sight.
Q. How long have you so known him?
A. About seventeen years, I think.
64 Q. Did you have any conversation with Mr. Boright at your place in the fall of 1881, in the fall before you were evicted from the farm?
By Mr. WILSON. I object to this as incompetent, irrelevant, and 190
immaterial.
A. I did; a few words.
Q. State the circumstances of that conversation—all what was said.
By Mr. WILSON. I object to that all as being incompetent, irrelevant, and immaterial.

A. Mr. Randall was sick, and we had sent for a doctor; I stepped out to look if he was coming; a man rode up that I recognized as Boright. He inquired if Mr. Randall was at home. I replied that he was and he was sick. He said that he wished to see him and talk
191 with him about his land—Randall's land. I told him that he had the quinsy; that his throat was so badly swollen no one could understand what he said only me. Sometimes he had to write on a slate for me to understand what he wanted. He said then, "I will come again." That is all.

Q. When was this?

A. It was about the last of November or first of December; I couldn't positively say the date.

Q. What year?

A. 1881.

Q. You have heard your husband's testimony relative to a con-
192 versation had between him and Mr. John Kapiska, have you?

A. I have heard it.

Q. Were you present at that conversation?

A. I was.

Q. When and where did that conversation take place?

65 A. It was the same spring after we had been ejected from our place; I could not say if it was May or June.

Q. That ejectment was in what year?

A. 1882.

193 Q. Go on and state what that conversation was.

A. Mr. Randall and I met Mr. Kapiska and his wife; we were afoot and they were in a wagon; he spoke to Mr. Kapiska and told him that he forbid him taking the cord wood that was cut on the place, as it was his; likewise the place was his, and he forbid him to take possession or meddle with anything on the place.

Q. What else was said?

A. Mr. Kapiska replied, "I have nothing to do mit you; you go fight mit Quackenbush."

Q. Anything else?

A. That was all I remember of being said; he said it more than
194 once; perhaps three times—those same words.

Q. Kapiska did?

A. Yes.

Q. Did your husband make any reply to that?

A. Simply reiterated what he said; that the land and wood were his, and for him to leave them alone.

Q. Where did you live from the time of your marriage down to the time of this ejectment that you have spoken of?

A. We lived on this land in question in section twenty-nine, town 111.

Q. Town of Sharon, in this county?

195 A. Town of Sharon, Le Sueur County; south half of the northeast quarter of section 29, town 111.

Cross-examination by Mr. WILSON:

Q. How long had you known Mr. John Kapiska before this time that you met him?

66 A. I don't know that I had ever seen him before.
Q. How long had your husband known him?
A. I don't know whether he had ever seen him before.
Q. You have given us every word that was said. 196
A. As near as I can remember; of course, that is near eleven years ago.
Q. Well, how did you know that John Kapiska was going to touch any cord wood that was on the land?
A. We had been informed that he had taken the place to tend the crop.
Q. Had bought it?
A. I am not sure that we had been informed then that he had bought it; we had been informed afterwards that he had bought it, but we had been informed that it was him that was working the place.
Q. You knew that he was working it, and this conversation was after you knew that he was working the place? 197
A. The conversation was after we knew that he was working the place.
Q. You say his wife was present?
A. His wife was with him.
Q. You heard your husband say that nobody was present but yourself?
A. He said that he didn't remember; he didn't say no one was present. Mr. Kapiska's wife was with him.
Q. You say you wouldn't say certainly the exact date that was?
A. I am not sure whether it was the last part of May or the first 198
part of June.
Q. Well, you didn't make any minute at the time of just what time it was?
A. No, I did not.
67 Q. And you didn't since have anything to refresh your memory?
A. Nothing since; just a general recollection that it was that spring, just a short time after the crop had been planted, after we had been put off. 199
Q. You wouldn't be sure that it wasn't a month or two different from what you say?
A. As near as I can remember, it was the last of May or the first part of June.
Q. You wouldn't be sure?
A. That is as near as I would be sure of; it was the last part of May or the first part of June.
Q. Would you be sure of a month or two from the time that you have said?
A. It wasn't a month or two from May, nor it wasn't a month or two from June.
Q. But that is as near as you would put it?
A. That is what I said, and that is what I mean. 200
Q. Now, as I understand you, you mean that it wasn't a month or two from May nor it wasn't a month or two from June?

A. That is what I mean. I would not swear it was May or June.

Q. What is there to make you recollect that it was either in May or in June?

A. I couldn't just specify, only a person is apt to remember the time of year.

Q. You would remember for eleven years what month it was in, wouldn't you?

201 A. I would remember that.

Q. But you have nothing to make you remember more than what you have said?

A. Simply that during those months we were passing back
68 and forward getting our things that had been thrown out, because they were going there to tend the corn that had been put in.

Q. They were going to tend the corn that had been put in. Didn't you go there after the month of June?

202 A. We went there in the month of October and got our wagon.

Q. You went there at this time they were tending to the corn?

A. I couldn't say as they were; that is the best of my opinion that was what they were going to do.

Q. Well, you have given us every reason that you have for remembering it, have you?

A. I don't know as I can give you more reason.

Q. Who made these written memoranda from which you have been refreshing your memory all morning here?

203 A. Part of it I copied from the old papers that we had in reference to him filing on the land and a part of it I made at the time it happened.

Q. Will you let me see that memoranda from which you have been reading? [Memoranda exhibited to counsel for defendants.]

Q. Do you swear that this wasn't all written at the same time?

A. That is merely a copy. That copy was all written at the same time. That is merely a copy of things that happened at different times.

Q. When was this written?

204 A. Last Saturday.

Q. By whom?

A. By myself.

Q. Do you swear now that this is just a copy of another single paper?

69 The first dates that are on there is a copy of another single paper that I have in my possession that I copied from; those other dates are from memoranda that I made at the time we were put off from the place.

Redirect examination by Mr. FAIRCHILD:

205 Q. What, if anything, did you or your husband do at the time of your eviction to give notice of your rights to the land in question?

By Mr. WILSON. I object to that as incompetent, irrelevant, and immaterial.

A. Well, when there was a man came there to evict us we simply stated our case; that that was our home and we refused to leave it;

they went away and came again and we still refused to leave the place; I had the door locked and the deputy sheriff, Mr. Rapp, demanded an entrance and told me if I refused to open the door—he had an axe in his hand—he would break the door down and force an entrance and place my husband and myself both under arrest for 206
resisting an officer. At that I opened the door; they ordered us then to take our goods and get out of the house, which we refused to do. They proceeded then to carry our goods out across the line and deposited them on another man's land. They ordered us to assist in taking the goods out, which we refused to do.

Q. What notice did you give to anybody?

A. Then the next morning we went back to the place—of course we could go back to the place—and there were men there to rent the land. We told them that it was ours and we would make a fight 207
for it still, and after a few days they gave up renting it, but we placed a notice on the door of the house, also on the stable, that that was our land, and forbidding any one to take possession of house or stable or land.

Q. That was a notice in writing?

70 A. The notice was in writing.

Q. Signed by whom?

A. By Boyd W. Randall.

Q. After you were married and went onto the place with your husband, state what improvements were made by you and him upon 208
the place up to the time you were put off.

A. Well, we continued to clear the land as much as we could—of course, living in the timber, he had to be absent a part of the time working to make something to live on. We had built a log house to live in in the winter, then afterwards a frame house, and we had a small frame granary; we had a well and had a log stable at the time of our ejectment. There was about twenty-one acres in crop and about four acres more ready to be put in that season. He, being deficient in eyesight, could not clear as much land as another man that had better eyes might have done, but we both did the best we 209
could.

LIVINGSTON QUACKENBUSH, sworn for defendants.

Direct examination by Mr. WILSON:

Q. Are you the Mr. Quackenbush who once owned this land?

A. Yes, sir.

Q. You conveyed it to John Kapiska?

A. Yes, sir.

Q. Do you remember about the date of that?

A. I don't know exactly; I think it was in 1882. 210

Q. Look at the date which I here exhibit to you and see if that will refresh your memory?

A. Yes, sir.

Q. After looking at that deed, please state to us the date at which you conveyed to Kapiska.

71 A. The 13th of June, 1882.

Q. What consideration, if any, did he pay you for it?

A. Thirteen hundred dollars.

211 Q. Did he pay that at the date that he entered upon it?

A. Well, I took a mortgage.

Q. That is, for part of it?

A. For part of it; yes, sir.

Q. Part of it he paid down?

A. Yes, sir.

Q. Before Mr. Kapiska purchased of you, did he rent of you or work the place in any way?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. No, sir.

212 Q. Do you know where Boright—Washington Boright—now lives—the man who deeded the land to you?

A. He lives in Knoxville, Tennessee.

Q. How long has he lived there?

A. I should think three or four years.

JOHN KAPISKA, sworn for defendants.

Direct examination by Mr. WILSON:

Q. Mr. Kapiska, where do you live?

A. I live in Sharon Town, Le Sueur County, section one.

213 Q. That is the town in which this land is?

A. Yes, sir.

Q. How long have you lived there?

A. I live here about twenty-three years in this town.

Q. Well, in this county?

72 A. In this county.

Q. How long have you lived in that town of Sharon?

A. So long as I been here. I come right up here twenty-three years—twenty-three years in the town.

214 Q. You were not born in the United States?

A. No; I come from—I born in Germany.

Q. How long have you been in the United States?

A. Well, just as long as I been here; twenty-three years.

Q. And you came directly from Germany here?

A. Came directly from Germany here.

Q. You are the John Kapiska that bought this land of Mr. Quackenbush?

A. Yes, sir.

Q. Do you remember when you bought it?

A. Yes.

215 Q. What date?

A. It must be in May; I couldn't say; it must be in the deed the same time. I remember, I guess it must be between the 15th and the 20th.

Q. Did you buy it at the date that the deed was made?

A. Yes; the 30th day of June.

Q. The 13th day of June, 1882?

A. Yes; I guess so.

Q. How long did you own that land?

A. About seven years; and the boy owned it, I guess, four or five.
Q. You seven?
A. Yes. 216
Q. When you went onto that land, what improvements were on it?
A. Well, it was in bad condition; some cleared off. I never measured, but the other people told it was about eighteen acres.
73 Q. About eighteen acres?
A. Yes; but the land was in very poor condition.
Q. Explain.
A. It was in low places, was grown up in grass, and some timber was cut off and some not. Some wood what they not couldn't use was 217 lying around pretty near rotten, was not cleared up. It was not very improved.
Q. Well, was that eighteen acres all cultivated well; if not, state how much of it was not, or was any of it cultivated well?
A. Well, I couldn't tell how much; they say it was cleared I guess before; twenty-two acres they told me.
Q. That is what who told?
A. That is what other people told; they living around there. I know not the place before, but that is what they always say. Some 218 of the field was worked and some not, so as I say was grown up in grass and weeds.
Q. What kind of buildings were on it?
A. Well, it was old; from a log house, I guess, it was first.
Q. What do you mean?
A. It was the first time a log house, and it was no fit for any use more. There was another house built.
Q. Was a log house there? Was there a log house there when you went there?
A. The logs had no roof on it; but then there was another house—a frame house—that was built on it. 219
Q. What kind of a house was that frame house?
A. Well, it was a house with a roof; of common boards sawed from the sawmill; no planed at all.
Q. Was the house lathed and plastered?
A. No; no plaster; I see no plaster in that.
74 Q. How did the boards stand? Up and down?
A. Up and down.
Q. And no lath and plastering?
A. No.
Q. Was it more than one story? 220
A. No; just one story.
Q. What was the roof?
A. The roof was made from, I call them clapboards here, from what is put out but not fit for the barrel factory. The roof was made from clapboards what was not fit to use in the barrel factory.
Q. How big was the house?
A. Well, I never measured that house, but I think I must know how big it was; I guess I call them, so near I can say, about by 16 by 20 somewhere. I don't know if I am sure or not, but I guess I call it so.

221 Q. Was it fit to live in in the winter?

A. No; just a shanty.

Q. What other buildings were there on there beside that?

A. A small log barn for two horses, a little roof for the oats bin. A small log barn for two horses and a little place for the oat bin.

Q. Anything else—any other building on it?

A. That was the building, all what was on it; when I come there I see no building at all there.

Q. When you bought this of Mr. Quackenbush, you moved on it, did you?

A. No.

222 Q. Well, what did you do?

A. I got a farm that I live on in section one. In this section 29 I do the work to it.

Q. How near was it to your farm?

A. About six miles from the farm I live on.

75 Q. And you continued to live on your own farm?

A. Yes.

Q. Did you work this all the time after you got it from Quackenbush?

223 A. O, yes; all the time.

Q. Before you bought it from Quackenbush, did you work on it at all?

A. No.

Q. You had nothing to do with this place until you bought it from Quackenbush?

A. No.

Q. Well, what improvements did you make on this land while you had it?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

224 A. Well, I go on and cleared the timber. I cleared that up and those logs.

Q. You mean you cleared up what he claimed to have cleared?

A. Yes. The best of the wood had been cut, and what was left was no fit for wood any more; I cleared that up and improved half of the land.

Q. Well, was that part of this eighteen acres or some other piece?

A. No; that was all the piece.

Q. Well, did you have to grub it out?

A. Sure, I have to grub it out.

Q. You say that he had taken off all of the good wood?

225 A. Yes.

Q. How much did you grub out—how much improvement did you make while you had this?

By Mr. FAIRCHILD. Same objection.

Q. All you did by way of improving this before you sold to your son?

76 A. About how much?

Q. How much did you grub? Did you put up any building? Did you improve in any way?

By Mr. FAIRCHILD. Same objection. 226
A. I did no improvements on the building before the boy got it.
Q. You did none?
A. But I clear up and improved the land.
Q. How much?
A. About ten acres, more.
Q. Did you grub that out?
By Mr. FAIRCHILD. Same objection.
A. I grubbed that out. I got a hired man and a small piece; I grubbed that out before I break it.
(The counsel for the United States objects to any evidence tending to show what improvements were made on this land by this man, 227
or by any other witness, as incompetent, irrelevant, and immaterial.)
Q. You grubbed the small trees?
A. Yes.
Q. How much was it worth, what you did there?
By Mr. FAIRCHILD. Same objection.
A. Well, I call that worth five hundred dollars.
Q. Well, was it worth five hundred dollars?
A. Yes; it was. It was worse than if nothing had been chopped off.
Q. If nothing had been chopped off of it there, would the wood that was on the land be worth anything? 228
A. Sure it was. The good wood was out, and there was no more than what was on that.
Q. The good wood was out?
A. It was out.
Q. And what was on was worth nothing?
77 A. Yes.
Q. Was the wood on that land before any of it was cut off valuable?
A. It was good wood.
Q. Would it sell? 229
A. Sure; maple wood would sell anywhere, but that was gone.
Q. You say you made some five hundred dollars' worth of improvements on it?
A. Yes, sir.
Q. About what time did you sell to your son, do you remember?
A. Well, it was after seven years.
Q. Was it in April, 1888, you sold to him?
A. Yes.
Q. Well, now, you may state wha the paid for it or what you sold 230
it for.
By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.
A. I sell it to him for two thousand dollars.
Q. Explain what you mean by that.
A. That is as much as I know.
Q. Well, how much did he pay you?
A. He paid me five hundred dollars.
Q. In money?

A. In money.

Q. Now, what was the rest for?

231 A. The rest that is I give to my children, everybody a part of what I owe him; the rest he got it for his share.

Q. You gave to him just what you gave to the other children?

A. Yes.

78 Q. But he paid you in addition to that five hundred dollars in money?

A. Yes.

232 Q. During the time you had this land, who paid the taxes on it?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. I.

Q. You did. During all this time that you were improving this place did, Mr. Randall say anything to you?

A. No. I know not Mr. Randall or Mr'. Randall. They say nothing to me.

Q. Well, now, I will call your attention to a conversation that Mr.
233 and Mrs. Randall testified to this morning, when they met you on the road.

A. Well, that was about this wood.

Q. Well, now, was that after you had bought the place?

A. After I had bought the place.

Q. Now, state just what they said—what Mr. Randall said to you at that time.

A. Well, he said—he meet me on the road and then he said: "I got some wood chopped here and you got no right on it; that is my property."

Q. What was his property?

A. The wood. I say, "Well, Mr. Randall, you see Mr. Quack-
234 enbush about this case. I bought it from him; he promised me to haul this wood in to him."

Q. You bought the wood from him and you promised to haul it in to him?

A. I got no time to haul it in. I told Mr. Quackenbush, if you want this wood brought away from there——

79 Q. I want to know what you said to Randall at that time.

A. I said, as I say before, about this wood, they have to
235 see Quackenbush; I will have nothing to do with that.

Q. Had Quackenbush, when he sold to you the land, reserved this wood? Were you to give Quackenbush the wood?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. Yes.

Q. What had Quackenbush asked you to do about the wood?

A. I had to haul it in to him.

Q. When Randall spoke to you, you told them that he must see
236 Quackenbush; that you had agreed to haul it in to Quackenbush?

A. Yes.

Q. Did Mr. Randall, at that time, say anything to you about his owning the land?

A. No.

Q. Did he speak about owning anything but that wood?

A. The same as I say. I never seen him. I saw him, but I know him not.

Q. But at that time—at that conversation—did he say that he owned the land, or only that he owned the wood? 237

A. He said he got some wood on the land there before, and he chopped the wood. That is what he said to me.

Q. You say that he said to you that he owned the wood?

80 A. I couldn't say what he meant; but that is what he said to me.

Q. I know that he said that to you; but did he say to you then that he owned the land?

A. No. 238

Q. Except at that time, had you any other conversation with Randall about this land?

A. No.

Q. All that time that you were improving that land and all the time that you owned it, did he ever have any other conversation with you or make any claim to this land whatever?

A. He never let me see him any more there that I know of.

Q. Who paid the taxes on this land during all the time that you had owned it?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and 239 immaterial.

A. I paid the taxes myself.

Cross-examination by Mr. FAIRCHILD:

Q. When did you first know about this land, Mr. Kapiska?

A. First know?

Q. Know about it. When did you first see the land?

A. The first time Mr. Quackenbush asked me he like to sell me that land, and I went out to look at it. Mr. Randall was not more 240 on the land. He was out there and put him off.

Q. When was that?

A. It was the same spring I bought it.

Q. When was it you had this talk with Mr. Quackenbush?

81 A. In May.

Q. May? When?

A. About the 13th of May. The deed was made at this time.

Q. The same year you got the deed? 241

A. Yes. Mr. Quackenbush got the corn planted there.

Q. The corn was planted before you saw it?

A. Yes. Mr. Quackenbush put in the corn.

Q. Was that the first time you ever saw the land?

A. Yes.

Q. In May, 1882?

A. Yes.

Q. You went out to look at it?

A. Yes; and then came in and saw Mr. Quackenbush, and then bought it from him.

Q. Anybody on the land when you went out there first? 242

A. No.
Q. Did you see Mr. or Mrs. Randall at that time?
A. I did not.
Q. Did you know them at that time?
A. I did not. No.
Q. Never had known them at all?
A. No.
Q. When did you see Mr. Randall to know him?
A. The first time after I bought it and that I met him on the
243 road, and then I found afterwards that he make a claim on that wood, and then I thought it must be Mr. Randall. He told me not that he was Mr. Randall.
Q. At the time you had this talk with him he didn't say who he was?
A. No.
82 Q. What did he say at that time?
A. Well, he say he owned—he wanted this wood—that I got no right to haul it away.
Q. Were you hauling it away at that time?
244 A. No. I leave that wood standing. Mr. Randall I guess he have the wood hauled away. I got it not.
Q. Now, I wish you would go on and tell me in your own way just what he said and what you said, and in the order in which you said it.
A. Well, I got no more talk mit him.
Q. When you first saw him what was said first?
A. Well, about this wood; that is what he said to me about this wood.
Q. What did he say?
A. He wanted this wood. That I got no right to haul this wood away.
245 Q. What wood?
A. Maple wood that is chopped; cord wood.
Q. What did he say about it?
A. Well, what he say, I say; just that he wanted that wood.
Q. Where was the wood?
A. The wood was right there.
Q. How did you know what wood he was talking about?
A. I knew that there was some wood chopped and piled up in bunches on the place. I saw that on the same ground what belongs to this eighty.
246 Q. Now, what did Randall say?
A. He wanted that wood.
Q. How did he come to say that to you?
A. He came over there and I met him on the road.
Q. On the place, was it?
A. No; it was not on the place.
83 Q. How far away?
A. About twenty rods from the place.
Q. You had never seen him before?
A. No.

Q. Did you know he had owned that place before? 247
A. No, sir; I know not who owned the place.
Q. Had you ever heard of this Mr. Randall before?
A. Oh, I heard of him, but I never knowed him.
Q. Had you ever heard of this Mr. Randall's claim before?
A. No.
Q. You swear to that?
A. Yes, sir.
Q. Positive are you about that?
A. Yes.
Q. Well, go on with your talk now; what else was said there? 248
A. Well, he said nothing more to me. That is all what I know. I couldn't give any more.
Q. Didn't he say he owned that wood?
A. Yes.
Q. He owned the land?
A. Well, he said not about the land. He said Quackenbush put him off from the land and he got that wood chopped. I told him, you go on and see Mr. Quackenbush what he would do in this case. I got nothing to do with you.
Q. Did he tell you he owned the land and expected to get it back again? 249
A. He told not to me.
Q. Didn't say that?
A. No, sir.
Q. When was this talk?
84 A. Well, I say that it was the talk all what he had to me.
Q. I say, when was it?
A. It was the same spring I bought it.
Q. What month? 250
A. In May.
Q. This talk was in May?
A. Yes.
Q. What part of May?
A. About the 20th, so around.
Q. Had you been working the land any before you had this talk with him?
A. Yes; I was going home from working and then I didn't know who he was before; the same he was going home and then he seen me on the road, and then he told me. That was the first time I see him.
Q. Your own place was about six miles from this farm, you say? 251
A. Yes.
Q. Where did you first see Mr. Quackenbush about buying the land—here in Le Sueur?
A. Yes.
Q. And he said he had this eighty acres and wanted you to buy it?
A. Yes, sir.
Q. Were you on the land more than once before you bought it?
A. When I owned it?
Q. Did you go to it more than once before you got the deed? 252

A. No.

Q. Just that one time that you went out to look a' it?

A. Yes.

85 Q. Who went with you to look at it—anybody?

A. My boy.

Q. This same one that you sold it to?

A. Yes.

253 Q. This boy lived with you then?

A. Yes.

Q. And up to the time that he took this place, did he live with you then?

A. Yes, sir.

Q. Helped you work the place and crop and sow it?

A. Yes.

Redirect examination by Mr. WILSON:

Q. When you bought that place from Mr. Quackenbush, did you
254 know that anybody had any claim to it except Mr. Quackenbush?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

Q. Well, I was not much acquainted all around here, but Mr. Quackenbush said he would give me a warranty deed on that land and I got nothing to do with any lawsuit or anything else.

(Counsel for United States here withdraws his objection.)

Q. He said he would give you a warranty deed?

A. Yes.

Q. Did you know that Randall made any claim to that land at the
255 time when you bought it from Quackenbush?

A. I did not.

Q. You asked Quackenbush if he had a good title, and he said he would give you a warranty deed?

A. Yes.

86 Q. Did you believe he had a good title?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. I guess so.

256 Q. Would you have bought, if you hadn't believed he had a good title?

By Mr. FAIRCHILD. Same objection.

A. No; if I get a good title I buy it.

Q. As I understand it, you said that the talk that you had with Randall and his wife was after you had bought the land. The talk that you had with Randall on the road there was after you had bought the land?

A. Yes.

Q. You don't remember just how long after?

A. Yes.

257 Q. You don't remember just how many days or weeks?

A. No; I couldn't tell. It was when I was working the land.

Q. And you didn't work the land before you had bought it and got your deed for it?

A. Not before; never seen it.

Q. Afterwards you bought eighty acres adjoining this?
A. Yes.
Q. And when you went out there to look at the land with your son Randall wasn't on it?
A. There was nobody on it more.

Recross-examination by Mr. FAIRCHILD: 258

Q. Quackenbush said he would save you against any lawsuit, did he?
A. Yes, sir.
87 Q. Did you speak of there being any lawsuit about it?
A. Well, he said he give me a warranty deed and I got my clear deed, and that is what he said to me.
Q. Did you ask him who owned the land before? 259
A. Sure, he knowed that. I have to ask him not. He told me who owned it before, sure.
Q. Who did he say?
A. Well, he knows better than I do. He bought it from Mr. Boright; that was the first owner.
Q. Well, what did he say about who had owned it before?
A. I don't remember more what he did say.
Q. He said he would save you against any lawsuit on it?
A. He did. Everything what is on this land I got my deed clear. 260
Q. You got your deed and anybody could look to him to defend it?
A. Yes; look to me.
Q. Was anything said between you and Quackenbush about Randall's claim to the land?
A. No.
Q. Nothing at all; are you sure of that?
A. Yes, sir.
Q. How did he come to talk about a lawsuit in the matter anyway?
A. Well, a good many land around here—when a man buy it—if I buy some from you, you give me a warranty deed; he got nothing 261 to do mit those others what is on that. I didn't know nothing.
Q. Did you know anything about the lawsuit that had resulted in Randall's being put off from this land?
88 A. I have heard that they say that they put that man out what was in the house, but I know not what he case was or what it was.
Q. How long before you went out on the place did you hear about the suit?
A. No; I hear no about the suit. They say there was a man in 262 the house, they put him out.
Q. When did you hear about that?
A. After I got it bought from Mr. Quackenbush.
Q. You hadn't heard that before you went out there to look at it?
A. No.
Q. When you went out to look at this land, did you go on it before you bought it, when you first went out there?
A. Yes.
Q. Did you go all over it?

263 A. Yes; I looked at the house and the barn and the house; not all over the whole woods.

Q. Was the house fastened up?

A. Yes, it was; that frame house.

Q. Was it fastened—locked up?

A. Yes; it was locked up.

Q. Nobody was there?

A. Nobody there.

Q. How long were you there about the place—how long were you there about the house—how long were you looking it over?

264 A. I took me not a whole day. I took me a half a day and then I go back. I got my team up. I guess it took me a half a day; then I go back to my home.

Q. How long were you there on that eighty acres?

A. Maybe an hour.

Q. Perhaps an hour?

A. Yes.

89 Q. Nobody else came while you were there?

A. No; nobody there around the house. The house was nobody in and on the land there was nobody.

By Mr. WILSON:

265 Q. Mrs. Randall said that they stuck up a written notice on the house and on the barn that it was theirs; was there any such thing when you were there?

A. No, sir; I saw no such thing.

Q. If you take your warranty deed from anybody don't you ask, just as you did of Quackenbush, whether they will take care of it for you?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. I do.

HERMAN KAPISKA, sworn for defendants.

Examined by Mr. WILSON:

266 Q. Mr. Kapiska, your Christian name is Herman?

A. Yes, sir.

Q. You are a son of the last witness?

A. Yes, sir.

Q. About what is your age?

A. About twenty-nine.

Q. Did you go out with your father to see this land before he bought it?

A. Yes, sir.

Q. You are the one?

A. Yes, sir.

Q. How long was that before he bought it?

A. I guess about two or three days; about two or three days after,

267 I think.

Q. When you were out there, was anybody on that land?

A. No, sir.

Q. Nobody on the place at all?
90 A. No, sir.
Q. Was any notice there in writing or printing on either the house or barn that anybody claimed it?
A. No, sir.
Q. You heard your father state about the size and kind of house, 268 did you?
A. Yes, sir.
Q. Well, now, you may state what kind of a house it was.
A. I guess he isn't very much of a mistake about it.
Q. Well, you state it as you remember it.
A. I judge it was about eighteen and twenty-four; I don't know whether I am mistaken or not.
Q. You judge it about eighteen and twenty-four; he said eighteen and twenty-two, I think.
A. If I am allowed, I believe it is eighteen and twenty-four. 269
Q. Now, how was the house built; how was it made?
A. With upright boards.
Q. Any lathing or plastering?
A. No, sir.
Q. Just standing up and down?
A. Yes, sir.
Q. What kind of boards?
A. Basswood boards.
Q. What kind of a roof?
A. Staves.
Q. Such as your father described?
A. Yes, sir. 270
Q. About the amount of land that had been before plowed there; how much?
A. About eighteen acres.
Q. Well, how had it been improved—how well? Just go on and explain.
91 A. Well, there was some places it was ordinary cultivation, and in other places, some part of low places, it was growed up with sod.
Q. Were the trees all off from it? 271
A. Yes; from eighteen acres.
Q. Were the stumps off from it?
A. No, sir.
Q. How long—well, was there any other improvements save what you have spoken of?
A. No, sir.
Q. That house on those eighteen acres?
A. No, sir.
Q. Was that eighteen acres in a good state of cultivation?
A. No, sir.
Q. Why not? Go on and explain. 272
A. Because it was not cultivated in a right way. It was destroyed in cultivation.
Q. Was that any more valuable than it would have been if it hadn't been cultivated at all?

By Mr. FAIRCHILD. I object to this.

Q. Was it any more valuable than if it hadn't been cultivated at all?

A. A very little bit.

Q. Well, now, besides eighteen acres, was there any more that had any chopping done on it?

A. Yes, sir; about ten acres.

273 Q. How much had been chopped on it, and how?

A. All the main wood was taken off from it; the best wood, the main wood, the big wood was taken off, except the brush and suckers grow'd up afterwards.

Q. Well, now, was that any better or worse because of that good wood being cut out and leaving the other?

92 By Mr. FAIRCHILD. Same objection.

A. It was worse.

Q. Has wood or timber any value there?

274 A. Yes, sir.

Q. Is it not true now there—for instance, land like that, land such as that was before any of the wood was cut off, that they would clear it for the wood—that is, a man would clear it for the wood?

A. Why, yes.

Q. Did your father purchase an eighty acres adjoining this?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. Yes.

Q. What year; do you remember?

By Mr. FAIRCHILD. Same objection.

275 A. No, sir.

Q. Well, how long after he purchased this; your best recollection?

By Mr. FAIRCHILD. Same objection.

A. No, sir; I couldn't say anything about it.

Q. Before he sold this to you he had purchased the other eighty, had he?

By Mr. FAIRCHILD. Same objection.

A. Yes, sir; he had bought the other eighty already.

Q. Did you live with your father up to the time that you bought this land?

A. Yes, sir.

276 Q. Do you remember the year that he deeded this to you?

A. No, sir; it was in April, 1888.

Q. Do you remember what you paid him for it?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

93 A. Yes, sir.

Q. How much money?

A. Five hundred dollars.

Q. Your father said that he gave to each of his children so much,

277 and that he estimated that he was giving you about two thousand dollars in this place.

A. Yes, sir; that is so.

Q. During the time that your father was on this place or owned it and worked it, do you know if anybody—if Mr. Randall—made any claim to it as far as you know?

A. No, sir.

Q. As far as you know, he didn't?

A. No, sir.

Q. What did your father do on it before it was deeded to you? 278

A. Why, he improved it and worked it.

Q. Just tell what he did.

A. Why, he farmed it and cropped it and cleared off the grounds, them ten acres.

Q. Grubbed that out, did he?

A. Yes, sir.

Q. He cultivated that, too?

A. Yes, sir.

Q. What was it worth to make the improvements that your father made that was on the place while he was on it?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial. 279

Q. The whole of the improvements that your father made on that place while he was on that place and before he deeded it to you?

94 A. I was one of the workmans and I wouldn't do it again for five hundred dollars, I don't care who hired me.

Q. How long did you continue to own it?

A. Owned it about four years.

Q. As I understand, your house has been just adjoining this 280 eighty?

A. Yes, sir.

Q. Upon the little piece of land that you have adjoining it?

A. Yes, sir.

Q. What improvements, if any, did you make upon this place while you owned it?

By Mr. FAIRCHILD. Same general objection as before.

Q. What did you put on?

A. A log barn.

Q How big?

A. Eighteen by twenty-eight, I believe. 281

Q. What else did you put on?

A. A house; I put that on the place and inside of two years I moved it off from the place.

Q. What else did you put on the place that you left on it?

A. Nothing at all, except fences.

Q. A granary?

A. No, sir.

Q. Had your father put a granary there?

A. No, sir.

Q. Just the house, then, was all?

A. Just the house. 282

Q. Had you grubbed any?

A. Yes, sir.

Q. How much?

A. Well, about two acres; between one and three.

Q. What did you sell this place for and to whom?

95 By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. I traded it to Alfred J. Mohler for a sawmill and five hundred dollars to boot.

283 Q. What was this sawmill worth?

By Mr. FAIRCHILD. Same objection.

A. Twenty-five hundred dollars.

Q. Was that what it was put in at?

A. Yes, sir.

Q. And was it worth it?

By Mr. FAIRCHILD. Same objection.

A. Yes, sir.

Q. In other words, I want to know what was that land worth in cash when you sold it to Mohler?

By Mr. FAIRCHILD. Same objection.

284 A. Three thousand dollars.

Q. While you were working that place and owning it, did Mr. Randall make any claim to that as far as you know—did he make any claim—did he say a word, or indicate in any way that he had any claim to it?

A. No, sir.

Q. How long ago was it that you sold to Mr. Mohler?

A. About a year and a half—something like that.

Q. You say he deeded you this sawmill and the ground on which it is and paid you five hundred dollars?

285 A. Yes, sir.

Q. During the time that you had it, who paid the taxes on it?

By Mr. FAIRCHILD. Same objection.

A. I did.

96 Q. Mr. Randall and his wife testified this morning, when you were not here, of meeting you on the road and having a conversation with you.

A. Well, I caught up with him when I was going to town afoot.

286 Q. About when was this?

A. That was two years after I had owned the place for myself.

Q. Very well; go on.

A. He asked me where I lived; I told him somewhere near the Welch settlement, and he said he had owned a place right near the creek, below George A. Roberts, and he said that Quackenbush and Mr. Kapiska, the sons of bitches, they scooted him out of it; and so he asked me who I was and I told him my name, and that wasn't my name at all.

Q. Was this statement of your name after he had spoken of

287 Quackenbush and your father beating him out of this place?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir.

Q. Well, what was the reason you gave him this other name?

By Mr. FAIRCHILD. Same objection.

A. Because I wanted to hear the conversation—what he was going to tell me—because my name was Kapiska myself.

Q. He had spoken about your father cheating him out of this thing? 288

A. Yes, sir.

Q. Tell what he told you.

A. That is all he told me.

Q. He said that had he owned that place and that they had scooted him out of it?

97 A. He said he had owned a place below George A. Roberts' and they had scooted him out of it.

Q. Did he pretend that he owned it then at the time he was talking with you?

By Mr. FAIRCHILD. Same objection and as leading. 289

A. He did not.

Q. Did he say anything more at that time about that except that he had owned the place down there and they had scooted him out of it?

By Mr. FAIRCHILD. Same objection as leading.

A. I can't remember all that.

Q. As far as you can recollect, did he say anything more about the ownership of that place but what you have stated?

A. No, sir.

Q. That, you say, was two years after you had bought it? 290

A. Yes; about two years after I had it in my own name.

Cross-examination by Mr. FAIRCHILD:

Q. You got a deed from your father to this place in 1888, you say?

A. Yes, sir.

Q. When did you pay the money for that deed?

A. If I paid him money, I guess it isn't much over a year ago I paid him money.

Q. You paid in money, did you?

A. Yes, sir. 291

Q. All at one time?

A. No; I don't believe I did all in one time. I paid him part one time and the rest I paid up here, I guess last winter.

Q. None of it was paid before about a year ago?

98 A. No, sir.

Q. In what year was it you had this talk with Mr. Randall?

A. Two years after I owned it for mine.

Q. That would be in 1890? 292

A. It was in the summer; maybe in June or July.

Q. Of 1890?

A. I guess so.

Q. He overtook you in the road and picked you up and you rode along with him and had the conversation there, did you?

A. Yes, sir.

Q. Did you ask him to ride or did you take him to ride?

A. He asked me to ride.

Q. Did you know him by sight before that?

A. Yes, sir.

293 Q. Well, what was the first thing he said to you?
A. After I rode with him?
Q. Yes.
A. He asked me where I lived; I told him I lived out there somewhere near the Welch settlement.
Q. Where is this Welch settlement?
A. It is right south of here. I lived right in the Welch settlement at that time.
Q. Then what was said?
A. He asked me what my name was—no; he said then that he owned the place right in there next to George A. Roberts', and he said
294 that Kapiska and Quackenbush, the sons of bitches, had scooted him out of that, so I didn't say anything more much about it and left him go on with his conversation to hear what he was going to say more about it. I heard all that I wanted to hear.
99 Q. Well, what more did he say about the land?
A. That is all.
Q. Then he asked you his name?
295 A. Yes, sir.
Q. And you gave him a fictitious name?
A. Yes, sir.
Q. That was all that was said about the land at that time?
A. Yes, sir; I didn't say a word about it.
Q. Just let him go on and make the statement?
A. Yes, sir. I wanted to hear a little, but I heard mighty little after that.
Q. Well, what was that little?
A. Well, that he owned that land and that he might have had
296 that land yet if they wouldn't put him in such shape.
Q. Did you ride clear up to town with him?
A. Yes, sir.
Q. Did you make yourself known to him before you got out?
A. No, sir.
Q. That was all that was said?
A. Yes, sir.

ALFRED J. MOHLER, sworn for the defendants.

Examined by Mr. WILSON:

Q. Mr. Mohler, where do you live?
A. I live down in Sharon.
297 Q. In this county?
A. Yes, sir.
Q. How long have you lived there?
A. About seven years.
Q. How long have you lived in this county?
A. I have lived in this county since 1856, I think.
100 Q. You know the land in question?
A. Yes, sir.
Q. You now own it?
A. Yes, sir.
298 Q. From whom did you purchase it?

A. From Herman Kapiska.

Q. How much did you pay for it?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.

A. I think that twenty-nine hundred dollars I paid him.

Q. How was that paid?

By Mr. FAIRCHILD. Same objection.

A. I let him have a sawmill of twenty-four hundred dollars and five hundred dollars in money.

Q. Was that property that you let him have, as you believe, worth that sum? 299

By Mr. FAIRCHILD. Same objection.

A. Certainly.

Q. Since that time you have owned this land?

A. Yes, sir.

Q. When you bought it, had you any notice or knowledge of any claim on the part of Mr. Randall to it?

A. No, sir.

Q. Have you made any improvements on it since you got it?

A. Yes; I have had about four or five acres cleared up on it. 300

Q. You mean grubbed and plowed?

A. Yes.

Q. How much is that worth?

A. The clearing of it up?

Q. Yes; and doing what you did.

101 A. Well, I should judge about twenty-five or thirty dollars an acre.

Q. What is that land now worth, in your judgment?

A. Well, it is worth three thousand dollars.

Q. Now, about clearing and improving the land. In case the 301 timber that was originally on that land was on it, would parties now clear it for the timber?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial, and no foundation laid.

A. Why, yes; certainly.

Q. In other words, the value of the timber on the land, if the good hadn't been cut out, would be equal to the cost of clearing?

By Mr. FAIRCHILD. Same objection.

A. Yes.

Q. Do you know—have you any experience in this, Mr. Mohler, 302 in persons clearing off land for the timber?

A. The man that is on it that is clearing—I gave him the timber for clearing it off.

Q. And he clears it off for the timber?

A. Yes, sir.

Q. But if the good timber was cut off, leaving just the smaller timber and brush and stumps, etc., then what would it be worth to clear it up?

A. Well, the good timber has all been cut off from this and he is clearing it up for the timber that is left.

Q. Timber, then, has considerable value?

A. Yes, sir.
303 Q. At that place?
A. Yes.
Q. Well, the date that you bought—did you state?
A. I think it was in June. The 19th of May, 1891.
Q. And you say you had no notice of any claim on the part of Mr. Randall?
102 A. No, sir.
Q. You supposed the title to be perfectly good?
A. Yes, sir.
Q. And did you pay at the time you purchased?
304 A. Shortly after—within a month or so.
Q. And until after you had made payment you had no notice of any adverse claim?
A. No, sir.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. Are you the head of a family?
A. Yes, sir.
Q. What age?
A. Fifty-two.
Q. You are an American born?
A. Yes, sir.
305 Q. How much land do you own besides this?
By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial.
A. Fifty-two acres.
Q. That is all that you did own at the time that you purchased this?
By Mr. FAIRCHILD. Same objection.
A. I didn't own that at the time.
Q. That is all you own now?
By Mr. FAIRCHILD. Same objection.
A. Yes, sir.
Q. Since you have bought it, who has paid the taxes on it?
306 By Mr. FAIRCHILD. Same objection.
A. I paid the taxes.
Q. Are you the head of a family?
A. Yes, sir.
Q. And you were at the time you purchased this?
103 A. Yes, sir.

Cross-examination by Mr. FAIRCHILD:

Q. Do you live on this land, Mr. Mohler?
307 A. No, sir.
Q. Where do you live with reference to it?
A. I live in the town of Sharon, about five miles from the land.
Q. How long have you lived there?
A. I have lived there two years it is.
Q. Where did you live prior to that?
A. Down in the same town, in Sharon.
Q. How far from this land?

A. Well, I should judge it was about the same distance; about five miles.

Q. How long did you live there?

A. Six years, I believe. 308

Q. And before that where did you live?

A. I lived at near St. Peter. When I came there I came from Cordova, this county.

Q. How far from here?

A. Thirty miles, I guess—I should judge it was that anyway.

Q. At the time you bought this land what, if any, steps did you take to examine the title?

A. Didn't take any.

Q. What, if any, inquiries did you make as to previous occupants of the land? 309

A. Don't remember of making any at all.

Q. How long had you known the land before you bought it?

A. I didn't know the land until a week or so before I bought it; a week or so.

104 Q. You know Mr. Randall, the witness who testified this morning?

A. Yes, sir.

Q. How long have you known him?

A. Well, I think the first that I saw him to know him was six or seven years ago. 310

Q. About the time you first came to Sharon?

A. Yes, sir.

Q. Where was he living then?

A. Why, I think he lived on the place belonging to Whittmore, about a half a mile or three-quarters south of where I was living, running the sawmill.

Q. Have you ever had any conversation with Mr. Randall about his claim to this land?

A. I have never had any.

Q. When did you first learn of there being a controversy as to the title of the land?

A. Well, it was when we went out to Mankato; we were notified 311 to go to Mankato.

Q. When was that?

A. I don't remember just when it was, but it was when we got notice to go to Mankato.

Q. That was after you bought the land?

A. It was last summer some time, I think, if I remember rightly. That was after I bought it.

Q. This service of the subpœna on you was the first knowledge you had that there was any controversy in regard to it?

A. Yes, sir. 312

Q. How long were you running this sawmill of which you have spoken?

A. About six years, I think.

Q. What has been your business ever since?

A. I have been farming some.

105 Q. Do you work this farm?
A. Yes; I have another place that I work.
Q. What do you do with this land, rent it?
A. Rent it.

313 Redirect examination by Mr. WILSON:

Q. The first notice you had of Randall's claim to this land was when the subpœna was served upon you in this suit to appear at Mankato?
A. Yes, sir.
Q. And that was long after you had bought and paid for it?
A. Yes, sir; long after.

L. QUACKENBUSH, recalled for cross-examination.

Examined by Mr. FAIRCHILD:

Q. How long have you lived here, Mr. Quackenbush?
314 A. I came here in 1869.
Q. You know Mr. Randall, the witness in this case?
A. Yes, sir.
Q. How long have you known him?
A. Why, it was ten years, probably; ten or twelve.
Q. For ten or twelve years past?
A. I think so.
Q. Did you know him when he lived upon this lan' in question?
A. I don't know that I did.
Q. Will you say that you didn't?
A. Well, I might have known him at that time. I don't remember about that time if I did know him.
315 Q. From whom did you get this land?
A. Of Boright. Washington Boright.
Q. When did you first learn of Randall's claim to the property?
By Mr. WILSON. Objected to as incompetent, irrelevant, and immaterial.
106 A. About the time I bought it of Boright.
Q. Before or after?
A. Before, I think.
Q. How long did Boright own it, or claim to own it, before you
316 bought it of him?
A. I don't remember. Not a great while, I don't think.
Q. At the time you first became acquainted with Mr. Randall, he was living on the place, I understand you to say?
A. Well, about that time.
Q. He was on there the first you knew of him?
A. Yes, sir.
Q. What is your first name, Mr. Quackenbush?
A. Livingston.
Q. Who is V. Quackenbush?
A. He is a nephew of mine.
317 Q. Does he live here?
A. I don't mean a nephew; he is a cousin. He does not live here.
Q. Did he at any time live here?

A. Yes, sir.
Q. When?
A. Well, several years ago. I don't remember now.
Q. Was he living here in 1881 and 1882?
A. I presume he was about that time.
Q. Was he in your employ at that time?
A. Yes, sir; he was in my employ some of the time.
Q. In what capacity? 318
A. Well, he done chores for me and worked some in the bank.
Q. Where is he now?
A. He is in Pembina. The last time I heard of him he was up there.
107 Q. As far as you know he is still there?
A. Yes, sir.
Q. How long before you got a deed to this land did you know of it or about it?
A. I knew of it about the time that Boright bought it, or about 316 the time he had the suit with Randall.
Q. What did you know about it at that time?
A. I knew there was a piece of land there—Boright said it was railroad land at the time.
Q. Were you ever out on the place?
A. Yes, sir.
Q. When?
A. Before I bought it of Boright.
Q. How long before?
A. I don't know; I think a short time before; I don't remember just how long.
Q. Your deed from Boright was April 27th, 1882. To the best 320 of your recollection how long before that was it that you were on the place?
A. It might have been a week.
Q. Might it have been a month?
A. No; I don't think it was.
Q. You swear that it wasn't?
A. No; I wouldn't swear how long before.
Q. Was it after the first of March, 1882?
A. I couldn't say when it was.
Q. You were out to look at the land?
A. Yes, sir.
Q. Who was in possession of the land then?
A. Boright, I suppose. 321
Q. You suppose; what do you know about it?
A. Well, Boright owned it at that time—that is, after his suit with Randall.
Q. Was Mr. Randall and his wife on the place then?
108 A. No, sir.
Q. You didn't see, then, when you were out to look at the land?
A. No, sir.
Q. Had any crops been put in at the time you were there? 322

A. No, sir.
Q. Did you put in a crop that year?
A. Yes, sir.
Q. Did you put in a crop yourself or have a tenant put it in?
A. I hired it put in for myself.
Q. For yourself?
A. Yes, sir.

Redirect examination by Mr. WILSON:

323 Q. Before you bought from Boright, you knew that the district court of this county had decided that Mr. Randall had no right to or interest in that land, didn't you?

By Mr. FAIRCHILD. Objected to as incompetent, irrelevant, and immaterial and leading.

324 A. Yes, sir.

109 *Testimony of James E. Moore.*

JAMES E. MOORE, a witness, produced and sworn on behalf of 325 the complainant, testifies as follows:

Examination in chief by Mr. EVANS:

Q. What is your name and occupation?
A. James E. Moore, land agent.
Q. Land agent for what company, and where do you reside or do business?
A. I am the manager of the St. Paul & Sioux City Land Company, and of the Northwestern Town Lot Company, and of the Prince Investment Company. I do business in St. Paul, Minnesota.
Q. Were you ever land commissioner of the St. Paul & Sioux 326 City Railroad Company? And if so, state when you were made land commissioner of that road, and how long you continued to be its land commissioner.
A. I was appointed land commissioner of the St. Paul & Sioux City Railroad Company July 1st, 1886, and I continued to be land commissioner until about December 1, 1891.
Q. As such land commissioner what were your duties with reference to the lands of the St. Paul & Sioux City Railroad Company?
A. I had charge of the office in which was contained all of the rec- 327 ords of the land grants in the possession of the company.
Q. And throughout your term of office you were the custodian of the records concerning the lands granted to the company and records of transactions were made by you?

110 A. Under my direction all records of transactions were made.

Q. Did you not also have charge of the adjustment of the land 328 grant with the General Land Department of the United States, and the obtaining of lands from the Land Department of the United States?
A. No, sir.
Q. Was not that business conducted through your office?
A. I would say it was, partly; but Mr. E. F. Drake, he had for many years been the president of the company, and he was thor-

oughly conversant with the affairs of the land grant, and he assumed the direction of all matters connected with the adjustment of the grant. I acted under his instructions.

Q. You did act in the matters referred to, but under the directions of Mr. Drake? 329

(Objected to by defendant's counsel as not only leading but suggestive.)

Q. You did act in the matter of the adjustment of the land grant in obtaining lands under it, under instructions from Mr. Drake?

(Objected to as leading and suggestive.)

A. Occasionally I did.

Q. All the records and communications and proceedings with reference to the grants were part of the records and files of your office, were they not?

(Objected to as leading and suggestive.)

A. I am not sure that the office under my control contained all of 330 the records, for the reason that Mr. Drake frequently visited Washington and conducted business there, and as senior trustee of the railroad company had a file in his own office.

111 Q. The office of which you had charge was the proper office in which the records relating to the land grant and its adjustment and administration should have been filed?

(Counsel for defendant objects to the question as both leading and suggestive, and for the further reason that counsel for the com- 331 plainant insists upon stating to his witness substantially what he wishes him to testify to.)

A. I am not sure that there would not be a difference of opinion with regard to that, as the trustees were charged with certain duties under their direction with respect to this matter, and they had their own office.

Q. As a witness, having been land commissioner of this road for the time that you say you have, and the duties of your office being as you have stated that they were, state what was the proper office of the company in which and through which the proceedings relative 332 to the adjustment of land grants made for the benefit of the St. Paul & Sioux City Railroad by Congress should have been conducted.

(Objected to as incompetent, and for the reason that this witness is not qualified to answer as an expert in this matter.)

A. The understanding given by the trustees to me, on my appointment as land commissioner—

(Counsel for defendant objects to the witness stating what the trustees stated to him.)

(Witness continuing) was that my duties were to be those of land 333 salesman, and that they would look after the adjustment of the land grant. That is all.

Q. Did you have anything to do, Mr. Moore, with obtaining the lands under the grants in favor of the defendant railroad company through the Department at Washington?

112 A. I visited Washington several times to carry out the instructions of the trustees.

Q. And as land commissioner of the defendant road, didn't you?

334 (Objected to as leading and also as suggestive.)

A. The first time I went to Washington on business of this kind I was not land commissioner.

Q. I am not speaking of the various and special times, but I am asking you if you did not have anything to do with obtaining the lands under the grants made by Congress for the benefit of the defendant road, through the Department at Washington, as land commissioner of the defendant road.

A. My belief is I was sent to Washington, not because I was land commissioner of the road, but because I was fairly well
335 informed on the subject of the grants.

Q. Isn't it a fact that you have had frequent communication with the Department at Washington concerning these land grants of the defendant company, and signed them James E. Moore, land commissioner?

A. Whenever I answered their official communications I always answered, James E. Moore, land commissioner.

Q. Will you answer my question? Isn't it a fact that you have had frequent communications with the Department at Washington concerning these land grants of the defendant company, and signed
336 them James E. Moore, land commissioner?

A. It is.

Q. Do you recollect, Mr. Moore, the fact that there was a question raised in the Land Department in the years 1889 or 1890 respecting the lands in controversy in this action?

113 A. I am not informed as to what lands are in controversy in this action.

Q. It is what is called in your office the Randall tract, the south half of the southeast quarter of section 29, township 111 north,
337 range 25, which was brought in question in the proceedings entitled Boyd W. Randall against the St. Paul & Sioux City Railway Company.

A. I remember distinctly the name, but I have no recollection of the claim made by the Government.

Q. Have you any recollection of the claim made by Randall?

A. My recollection is at present confined to an endorsement upon the tract book, I think in the office, that Randall made an adverse claim.

Q. Do you not recollect the fact that within the time I have men-
338 tioned there was a rule laid by the Interior Department against the St. Paul & Sioux City Railroad Company to show cause why the tract in question should not be conveyed to the United States, or proceedings brought under the act of March 3, 1887, to compel a conveyance, on account of the fact that it was claimed that it was excepted from the land grant to the St. Paul & Sioux City Railroad Company by reason of Randall's preemption entry?

(Objected to as immaterial, incompetent, and irrelevant.)

A. I don't remember.

339 Q. You never heard of that proceeding?

A. I wouldn't say I never heard of it. I have no recollection of the rule laid in that particular case.

Q. Will not the records of the office of the land commissioner of the St. Paul & Sioux City Railroad Company show that such a rule was laid?

114 A. They should do so.

Q. And if such a rule was laid during your administration of that office, your records will show it, will they not?

(Objected to as incompetent.) 340

A. I should suppose they would.

Q. Have you examined the records of the office of the land commissioner of the St. Paul & Sioux City Railroad Company to find out whether such a proceeding was brought to your attention at that time, or not?

A. I have not examined the records with respect to this particular case. The records are not now in my possession. I have been asked whether letters from the Commissioner of the General Land Office were filed, and I have assisted the present land commissioner in endeavoring to find them, but without success. 341

Q. Who is the present land commissioner of the St. Paul & Sioux City Railroad Company?

A. Edwin E. Woodman.

Q. Who has charge of the records of that office which were made during the time you were land commissioner?

A. Mr. Woodman.

Q. You are now in the employ of the St. Paul & Sioux City Railroad Company?

A. No, sir; I am not.

Q. Are you in the employ of the St. Paul & Sioux City Land Company? 342

A. That company is owned by myself. It has no connection with any other company in the world.

Q. Has it any connection with the lands of the St. Paul & Sioux City Railroad Company?

115 A. When the lands were sold I bought the lands, about the time of my resignation, and I formed this company to hold the title.

Q. Will you examine the records of the land office of the St. Paul & Sioux City Railroad Company, while you were land com- 343 missioner, and hereafter state whether or not you find any entry of this particular matter I speak of?

A. I will, if permitted to do so.

Q. You have no objection, personally, to do so?

A. No objection whatever.

Q. Then you say that, at the present time, without making any examination, you have no personal recollection, no present recollection, of the matter referred to?

A. None.

Q. Have you any recollection, Mr. Moore, of receiving any communication from the land office about the time that I have spoken 344 of with reference to any lands claimed by the Government to have been improperly certified to the St. Paul & Sioux City Railroad Company?

(Objected to as immaterial, incompetent, and irrelevant, and as having no reference to this tract in question.)

A. I recollect distinctly, but whether it was in 1889 or 1890——

Q. In 1889 or 1890, the latter part of 1889, or the early part of 1890, down to the 1st of April, 1890.

A. I have a distinct recollection of receiving communications
345 from the Commissioner of the General Land *Land* Office about that matter—that is, with respect to quantities of lands—but I have no recollection of any specific tract.

116 Q. Do you know who represented this company at Washington in its matters before the Land Commissioner?

A. Messrs. Curtis & Burdett were our attorneys at Washington for many years, and at that time.

346 Q. And they had represented this company whenever it was necessary to have representatives before the Land Department in its land matters, had they not?

A. Yes, sir.

Q. Do you recollect of the fact that sometimes during your administration as land commissioner of the defendant railroad company, communications addressed to Mr. W. P. Jewett as land commissioner of the St. Paul & Sioux City Railroad Company were handed to you by Mr. Jewett, or through him?

(Objected to as immaterial, incompetent, and irrelevant.)

347 A. I recollect that at least on one occasion, Mr. Jewett handed me a letter addressed to him as land commissioner of the St. Paul & Sioux City Railroad Company.

Q. Mr. Jewett was the land commissioner of the Sioux City & St. Paul Railroad Company, and had his office in the same building with you, just across the hall?

A. He had.

Q. Will you state where that letter was from that you have reference to, if you can recollect?

A. My recollection is that it was from the office of the Commissioner of the General Land Office.

348 Q. Did you, about the time that you received that letter through Mr. Jewett, address any communication to the Commissioner of the General Land Office, with reference to that matter?

A. I have no recollection; and without consulting the records I could not say.

117 Q. Did you at any time address any communication to the Commissioner of the General Land Office with reference to letters sent to Mr. Jewett which should have been sent to you?

349 A. I dont remember.

Q. I hand you copy of a letter dated at St. Paul, February 20, 1890, addressed to Mr. L. A. Groff, commissioner, etc., and signed J. E. Moore, land commissionr, and ask you to read it, and then state whether or not you wrote such a letter as the copy purports to be.

(Objected to as immaterial and incompetent, and for the reason that the witness can not refresh his recollection by an instrument purporting to be a copy which he does not know to be a copy or to have been made by him at the time of the transaction.)

A. I have no recollection of having written this letter, but I 350
presume that I did so.

Q. You presume that you did so. If you did so, Mr. Moore, will you state what would be the occasion of the writing it?

(Objected to as incompetent.)

A. The reading of this letter gives the reason; that letters have been addressed to Mr. W. P. Jewett, instead of having been addressed to me, as land commissioner of the railroad company.

Q. Then, in writing that letter the fact had been called to your attention by Mr. Jewett, or by someone else, had it not? 351

(Objected to as immaterial, incompetent, and irrelevant.)

A. It doubtless had.

Q. And shortly before that?

A. Probably.

118 Q. Do you know about how many letters were received by you from the General Land Department which came to you through Mr. Jewett, having been addressed to him in the manner hereinbefore stated?

A. I don't remember. 352

Q. Were there one or more?

A. There was certainly one, but I can not say that there were more from recollection.

Q. I hand you copy of a letter dated February 17, 1890, addressed to W. P. Jewett, land commissioner, etc., signed by L. A. Croff, commissioner, and ask you to read it in connection with the letter that has just been considered by you. Have you read the letter referred to above?

A. I have.

Q. State whether the copy of the letter of February 20, 1890, which you have just read, and signed by you, or purporting to be 353
signed by you, if written by you, does not refer to the letter of February 17, 1890, signed by L. A. Groff, commissioner, a copy of which you have just read.

(Objected to as immaterial, incompetent, and irrelevant, and also on the ground that this hypoth'ical question is based upon the assumption that certain letters were read.)

A. I have no recollection of its having done so.

Q. Have you any recollection of having signed the copy of the letter as commissioner which has been handed you, or the original of that letter? 354

A. I have no recollection at the present time of that letter.

Q. If such a letter were handed to you by Mr. Jewett, or through his office, what would become of it, what would be done with it?

119 (Objected to as immaterial and incompetent.)

Q. What would have become of it, and what would have been done with it by you as land commissioner of the St. Paul & Sioux City Railroad Company?

A. Ordinarily I should have dictated a letter enclosing such a 355
communication at once to Curtis & Burdett, our attorneys at Wash-

ington, who had entire charge of all such matters before the Department as attorneys of record of the railroad company and of the Land Office.

Q. Would you keep a copy of such communication?

A. All letters written by me upon official subjects were copied in the letterpress copy book.

Q. Were any memorandum of the fact made in your office in any record book?

A. No, sir; not necessarily.

356 Q. Who has the copies of the letters which were written by you as land commissioner at that time regarding land matters to Curtis & Burdett?

A. My successor.

Q. Mr. Woodman?

A. Mr. Woodman.

Q. Have you made any examination of the records or letters written at that time to see whether such a communication as this, purporting to be signed by the land commissioner and dated February 17, 1890, was sent to Curtis & Burdett?

A. None whatever.

357 Q. Have you any recollection of making such an examination at any time?

A. No, sir.

Q. Have you now any objection to make such an examination and testifying hereafter as to the result thereof?

120 A. None whatever, if I am permitted to do so.

Q. The office of the land commissioner of the St. Paul & Sioux City Railroad Company is now in St. Paul, is it not?

358 A. It is.

Q. And the commissioner has his office here—the present commissioner?

A. He has.

Q. I will ask you, then, to make an examination of the records, if you are permitted to do so, for the purpose of testifying as to what the records of the office show as to the receipt of the letter addressed to Mr. W. P. Jewett, hereinbefore referred to, and as to the rule to show cause hereinbefore referred to, and as to all other matters relative to said rule to show cause, and as to these letters which are shown by these records, and then I will call you again as

359 a witness.

Mr. WILSON. I state to counsel for complainant that as to any specific matter in those records, to wit, the reception of any of the letters referred to or the transmission of the letter referred to to Curtis & Burdett or any particular matter stated, that permission will be given to this witness to examine the records, but not as to a general examination of matters indefinitely.

The further examination of this witness in chief is deferred until the examination of the records is made by him.

JAMES E. MOORE recalled, and his examination in chief continued as follows: 360

By Mr. EVANS:

Q. Mr. Moore, have you examined the records in the office
121 of the land commissioner of the St. Paul & Sioux City Railroad Company for the purpose of finding what entries, if any, were made in your books relative to the matter I asked you about when you were last on the stand?

A. Yes, sir. 361

Q. Will you state the result of that examination?

A. I found a letter-press copy book of the land commissioner's correspondence, and in that book I found an impression copy of a letter written by me to Hon. L. R. Groff, Commissioner General Land Office, under date of February 20, 1890, requesting that he address all communications intended for the land commissioner of the St. Paul & Sioux City Railroad Company to me as such officer, and referring to the fact that communications intended for me had been addressed to W. P. Jewett as land commissioner of the St. 362 Paul & Sioux City Railroad Company.

Q. Is the copy of the letter which I handed to you a copy, or does it purport to be a copy of the letter you have just referred to?

A. It appears to be an exact copy.

Q. What further did you find?

A. I also found a letter addressed by me on the same day to Messrs. Curtis & Burdett, of Washington, D. C., with which I enclosed a communication addressed to W. P. Jewett, land commissioner of St. Paul & Sioux City Railroad Company, by the Commissioner of the General Land Office, requesting the St. Paul & Sioux City Railroad Company to reconvey. I will read you the letter, 363 which is as follows:

Messrs. CURTIS & BURDETT,

Washington, D. C., February 20, 1890.

122 GENTLEMEN: A letter is received to-day, dated February 17, 1890, and addressed to W. P. Jewett, land commissioner of the St. Paul & Sioux City Railroad, by the Commissioner of the General Land Office, directing this company to reconvey to the 364 United States the title to the south half of the northeast quarter 29,111, N. 25 W. The letter states that there is enclosed a copy of the decision of the Secretary of the Interior, dated January 23, 1890, but no such enclosure is found. All of which proves that mistakes are possible in the General Land Office. I note, after examining our records, that your firm addressed Mr. E. F. Drake a letter on October 23, 1882, stating that an attempt was then made to reopen this case, and asking for instructions. This land was sold by this company, paid for, and deeded August 30, 1881, to Mr. Washington Boright. I feel some interest in learning upon what 365 grounds the Secretary of the Interior demands this reconveyance. If at this date, when we are closing up our grant, and will soon have sold our last acre of land, the Government insists upon attaching the title to that which has been sold, and the proceeds from

which have been divided among those who are no longer stockholders, I can not easily see where the end will be reached. Matters with this company have reached a point in liquidation at which we find very little property remaining and very few parties in interest. Out of the $4,800,000 special stock covering our land grant, only
366 about $700,000 remain outstanding, and there is no expectation that the unsold portion of the grant will realize enough to retire this stock at near its face value. As I hold personally about one-third of the remainder of the stock, I am beginning to be impatient to learn just how far the Government proposes to ruin me for no
123 other reason than my taking what has been done in the past to have been rightfully done. I desire to inform myself fully as to the possibility of an immediate adjustment of our grant by the
367 Interior Department, in order that if possible some things may at least be considered settled. Will you kindly inform me at your earliest convenience whether there is any active work being now done in the General Land Office in the direction of a complete and final adjustment of the grant to this company, and whether or not I can by visiting Washington arrive at a definite idea from the present condition of the records there of the amount of acres that the Government admits we have earned, and contrast that amount with the amount they claim we have received.

368 Yours, very truly, JAMES E. MOORE,
Land Commissioner.

Q. After refreshing your recollection by the letter you have just read, I will ask you to state if the letter which I handed you previously, and which I now hand you, dated February 17, 1890, addressed W. P. Jewett, land commissioner, St. Paul & Sioux City Railway Co., St. Paul, Minnesota, and signed L. A. Groff, commissioner, if you can say whether it is a copy of the communication which you enclose to Curtiss & Burdett with the letter above quoted?

A. I have every reason to believe it to be a copy.

369 Q. Did you receive the information you asked for in that letter from Messrs. Curtiss & Burdett as to the reasons why the Government caused this demand to be made?

A. I did not, to my recollection.

124 Q. They did not reply to the letter you addressed to them?

A. I have no recollection of ever receiving any definite reply to that letter.

370 Q. Did you address any communication to the Commissioner of the General Land Office, directly, in answer to this letter dated February 17, 1890, which was addressed to W. P. Jewett, as land commissioner of the St. Paul & Sioux City Railway Company?

A. I have no recollection of addressing any other letter to him with respect to the matter than the one already in evidence, asking that such communications be addressed to me instead of to Mr. Jewett.

Q. No reconveyance of this land was made to the United States in answer to this demand?

A. None.

(Counsel for complainant now offers in connection with the testi- 371
mony of this witness, and also as part of his case in chief a certified copy as shown witness, of certain letters, to wit, letter dated February 17, 1890, addressed W. P. Jewett, land commissioner, St. Paul & Sioux City Railway Company, St. Paul, Minnesota, signed L. A. Groff, commissioner; letter dated February 20, 1890, from James E. Moore, land commissioner, to Hon. L. R. Groff, Commissioner General Land Office, Washington, D. C.; also a letter from W. M. Stone, assistant commissioner, to Curtis & Burdett, attorneys St. Paul & Sioux City Railway Company, together 372
with the certificate from the General Land Office attached thereto.

Counsel for defendant objects to the reception and evidence of the letter from W. M. Stone, commissioner, to Curtis & Burdett,
125 as immaterial, incompetent, and irrelevant. Said letters are marked complainant's Exhibits E, F, and J, hereof, respectively.)

Q. Do you find upon examination of the records any record of a communication to the land commissioner of the St. Paul & Sioux City Railway Company referring to the matter of Boyd W. Randall 373
against the St. Paul and Sioux City Railway Company or the rule to show cause about which I have asked you, with reference to that claim?

A. I find a memorandum in pencil upon a tract book containing the field notes with respect to the south half of the northeast quarter of section 29-111-25.

Q. Will you please state what that memorandum is?

A. It is a pencil memorandum in the handwriting of Edward Sawyer, at one time secretary of the land department of the St. Paul & Sioux City Railroad, to this effect: "Boyd Randall—" 374

(Objected to by defendant's counsel as immaterial, incompetent, and irrelevant.)

"Settled, paid up, and cancelled, south half of the northeast quarter, Le Sueur."

Q. What other memorandum do you find in the same book?

A. Here is a pencil memorandum in my own handwriting—

(Objected to by defendant's counsel as immaterial, incompetent, and irrelevant.)

As follows: "Letter of October 23, 1882, from Curtis & Burdett to Hon. E. F. Drake, says attempt is made to reopen case, and 375
ask instructions." Also the following pencil memorandum in my own handwriting, which is as follows: "Letter, February 17, 1890, Commissioner General Land Office, demands reconveyance to Government."

126 Q. These two memoranda were made by you when you were land commissioner from letters brought to your attention?

A. They were. I will qualify that; the last two pencil memoranda were made by me while I was connected with the office of 376
the land department, and the one in 1882 was before I became land commissioner.

Q. The letter of 1882; that was before you became land commissioner, you say?

A. Yes, sir.

Q. What position did Mr. Drake hold at the time of the letter to Curtis & Burdett?

A. He was vice-president of the St. Paul & Sioux City Railroad Company, and trustee of said company under a trust deed of July 30, 1879.

376 Cross-examination by Mr. WILSON:

Q. What trust was that called of which he was the trustee?

A. It was commonly known as the Drake & Wilder trust, and sometimes referred to as the red trust.

Q. Ordinarily the Drake & Wilder trust?

A. Yes, sir; the Drake & Wilder trust.

Q. That trust deed was dated July 30, 1879; do you remember whether that did or did not include all the lands granted by Congress to aid in the building of the line of the St. Paul & Sioux City
378 road, except those that were actually used for railroad purposes?

(Objected to by complainant's counsel as immaterial, incompetent, and irrelevant, and not the best evidence.)

A. I remember it did not include all of the lands.

Q. If it did not include all of the lands, what did it include?

127 (Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

A. It included all lands not previously conveyed by the railroad
379 company which inured to it under the grant, except the first four hundred thousand acres of land which had been previously set aside under trust deed of January 2, 1871, and the right of way of the operating road.

(Counsel for complainant objects to the witness stating from recollection the contents of the trust deed.)

Q. These four antecedent grants before conveyed in trust were called what trust?

(Objected to by complainant's counsel as immaterial, incompetent, and irrrelevant, and as not the best evidence.)

A. The trust deed named William R. Marshall as trustee, and he
380 was in 1875 succeeded by Charles H. Bigelow as trustee. The trust after that date was commonly known as the Bigelow trust, and sometimes is called the green trust.

Q. That Bigelow trust, the so-called green trust, passed those lands to the trustee therein named for the purpose of paying certain indebtedness, did it not?

A. Yes, sir.

(Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

Q. It had required all of those lands to pay that indebtedness?

A. That indebtedness is not yet paid, and the property is not sufficient to pay that indebtedness.
381

Q. And the Drake & Wilder trust, which you say included the remaining lands not included in the right of way, were they or were they not all required to pay the indebtedness for which they were conveyed in trust?

128 (Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

A. The property in the Drake & Wilder trust has proven insufficient to pay the indebtedness for which the property was set apart.

Q. And that Drake & Wilder trust has expired, has it not, and 382
been all used up?

A. The property was disposed of when the Drake & Wilder trust expired, July 30, 1891.

Q. The lands theretofore conveyed in or by the terms of that trust were all disposed of in pursuance of that trust before that?

A. They were before that time wholly disposed of.

(Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

Q. When you spoke in that letter that you wrote to Curtis & Burdett of your being a stockholder, what did you mean by being a 383
stockholder?

(Objected to by complainant's counsel on the ground that the same is immaterial and incompetent and irrelevant, and not the best evidence.)

A. I meant I held special stocks issued by the St. Paul & Sioux City Railroad Company under both trusts, which were then secured by property enuring to the railroad company under its land grants.

Q. Did that include this very tract of land in question here?

(Objected to.)

Q. This very tract of land in question?

(Objected to as immaterial, incompetent, and irrelevant, and as not 384
the best evidence.)

A. It did not; and for this reason, that this tract of land had been sold, and the proceeds from the sale had been, in 1881, paid to the holders of stock, the holders of special stock of the trust of January 2, 1871.

129 Q. That was the Bigelow trust?

A. Yes, sir; the Bigelow trust.

Q. The stockholders of the Bigelow trust had obtained the consideration paid for this land when it was sold? 385

A. They had.

Q. Now, when this land was sold, what was the consideration for the sale?

A. The consideration was $600.

Q. When you spoke of Mr. Drake as trustee, then yous poke of Mr. Drake as trustee acting under the so-called Drake & Wilder trust, did you not?

(Objected to as immaterial and incompetent.)

A. I don't remember of having spoken of Mr. Drake as trustee in connection with this piece of land.

Q. Did you not refer to Mr. Drake as trustee in the letter which you wrote to Curtis & Burdett? 386

A. I think not. It is not so stated.

Q. Under the Bigelow trust, and under the Drake & Wilder trust, was not the railroad company required to convey the lands embraced in those respective trusts upon sales thereof being made by the trustees?

(Objected to as immaterial and incompetent, and as not the best evidence, and also as leading.)

A. The company was obligated to do so by the terms of each trust.

Q. When such a deed was made to whom did the consideration go under and in pursuance of the terms of each of those trusts,
387 respectively?

A. To the trustee or trustees, respectively, named in the trust.

Q. Do you know who employed Curtis & Burdett as attorneys down there?

A. I do not. I do not know who in the first place
130 employed them. I found them acting in October, 1881, when I entered the employ of the land department, as the attorneys for the land department, at Washington.

388 Q. Do you know that they ever acted with reference to the land grants of this road, except in pursuance of their employment by the trustees?

(Objected to by complainant's counsel as immaterial, incompetent, and irrelevant, and as assuming a state of facts which does not appear in the evidence.)

A. I do not. There was not anything else for them to do in connection with the land grant but under directions of the trustees, because the railroad company had assigned to those trustees all their right, title, and interest in the land grant.

Q. Who was appointed trustee under the Drake & Wilder trust?
389 (Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

A. F. F. Drake.

Q. You say he was vice-president of the road; had he anything to do whatever practically with that road, except as to the administration of these two trusts, after the time of which you speak—say after the sale of the road to the Omaha Company?

A. He was in both. He was attorney in fact of one and senior trustee of the other.

Q. Now, except as to this administration of these trusts, after the
390 St. Paul & Sioux City Railroad was sold to the Omaha Company had he anything to do with—any practical connection with the road, except as to the administration of those trusts?

A. He had everything to do with the administration of the
131 affairs of the St. Paul & Sioux City Railroad Company under the trust deeds, but he had no duties in connection with the operation of the road.

Q. When was this sale to the Omaha company—about what date?
391 A. The sale, I think, was perfected in the beginning of 1880.

Q. Since that time it has been operated exclusively by the Omaha company, has it not?

A. It has.

Q. What book do you call this which I here present to you?

A. It is a book containing the field notes of lands enuring to the St. Paul & Sioux City Railroad Company, under its grants, in range 25.

Q. Is that the very book from which you read the memoranda in your direct examination here?

A. It is the same. 392

Q. Look at that book and see if it shows when the tract of land here in question was sold to Washington Boright?

A. I find a pencil memorandum in my own handwriting that appears opposite the tract of land herein referred to, "sold to Washington Boright August 30, 1881."

Q. Have you now any distinct recollection except what that memorandum shows you as to the fact?

A. I was not connected with the land department at that date.

Q. How did you come to make that; do you know? 393

(Objected to by complainant's counsel as immaterial, incompetent, and irrelevant.)

A. As this memorandum is not of a class which is usually placed upon a tract book, I assume that I placed it there when the
132 claim upon the company by the United States was made for the reconveyance of this land.

Q. Look at this other book which I exhibit to you, and tell me what that book is, and whether it is a part of the records of the 394 land department of that company.

A. This book is the record of deeds issued by the land department of the company.

Q. Is it one of the original records?

A. It is.

Q. Look at that book and see whether there are any memoranda there touching this deed to Washington Boright, and if there are any memoranda, tell me by whom they were made.

A. I find on August 30, 1881, in the handwriting of W. B. Dix, who was then a clerk in the employ of the land department, a 395 record of a deed having been issued on that day, August 31, 1881, to Washington Boright for eighty acres.

(This last question and answer is objected to by complainant's counsel as immaterial, incompetent, and irrelevant, and not the best evidence.)

Q. Do you know whether that was the eighty in controversy here?

A. I do.

Q. What is it?

A. For the reason that that entry refers to book 4, page 22 of range book, upon which the tract here in question is the only tract 396 described.

Q. Is that entry made in his handwriting there one of the entries made in the usual course of business in that book, as the book itself shows?

A. It is.

Q. Are there any other memoranda opposite that entry; and if so, what, and by whom made?

133 (Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

A. There is an entry in the column of remarks, opposite the record of this deed, in red ink, in my own handwriting, which is as follows: "November 22, 1881, made quitclaim deed, register of 397 deeds for Le Sueur County, certifying that original was lost without record."

Q. You say these memoranda are in your handwriting?

A. The last of these memoranda are in my handwriting.

Q. Were these memoranda made by you on the dates that they purport to have been made?

A. They were.

Q. Had you before you at that time this certificate from the
398 register of deeds of Le Sueur County as to the loss of that deed?

(Objected to as immaterial, incompetent, and irrelevant.)

A. Undoubtedly.

Q. As a matter of fact, was a quitclaim deed issued to Washington Boright at that time for the reasons you have stated?

(Objection to as immaterial, incompetent, and irrelevant.)

A. A quitclaim deed was made, and for the reason therein stated.

399 Q. Please look at the deed which I here exhibit to you and state what it is; I don't mean who executed it, but whether it is a warranty or a quitclaim deed.

(Objected to as immaterial, incompetent, and irrelevant, and as not the best evidence.)

134 A. It is the usual printed form of warranty deed issued by the land department of the St. Paul & Sioux City Railroad Company, up to a certain date.

400 Q. Up to about what date was that form of deed used?

A. I think it was used until the latter part of 1881, at which time a new form of deed was adopted.

Q. You may read the covenants in that deed.

They are as follows: "Said party of the first part, for itself and its successors, covenants with said party of the second part, his heirs and assigns, that it is seized in fee simple of the premises aforesaid, and that it has good right to sell and convey the same; that said premises are free from all incumbrances, and that said party of the second part, his heirs and assigns, shall quietly and peac'ably enjoy and possess the same, and the party of the first part
401 will warrant and defend the title thereto against all lawful claims."

Q. Look at this other book which I here present to you and state what it is, and whether it is one of the regular records of the land office.

A. This is a range book, containing a record of lands enuring to the grants, and a full description of the sale of the same.

Q. Is it one of the books in the office of the land department of this company regularly kept?

A. Yes, sir; it is.

Q. Look at that book and state if it shows at what time the deed
402 was made to Washington Boright of this land in question.

A. It does.

Q. At what date was it made?

A. August 30, 1881, sale was made, and it was deeded on the same date.

135 Q. As appears by this book?

A. As appears by the record in this book.

Redirect examination by Mr. EVANS:

Q. You spoke in your examination in chief of a portion of the 403
memorandum in what you call the tract book of the land department of the St. Paul & Sioux City Railroad Company, opposite the tract in question, being made in pencil by someone other than yourself. Who was the gentleman who made the memorandum which was not made by you?

A. Mr. Edward Sawyer.

Q. Was he at that time in the employ of the St. Paul & Sioux City land department?

A. Yes, sir.

Q. The book out of which you read the memorandum was—you said, the tract book? 404

A. Yes, sir; containing the field notes.

Q. And kept in the office of the general land department of the defendant road?

A. Yes, sir.

Q. The business, or the administration rather, and all the business appertaining to the land grants in favor of the St. Paul & Sioux City Railway Company, or in aid of its line, has been all along up to the present time administered by the Department in Washington in the name of that company, has it not?

A. I think it has.

Q. And the Mr. Drake to whom you refer was the vice-president 405
of that company and in that capacity has looked after the land grants in the Departments at Washington.

(Objected to by defendant's counsel as immaterial and incompetent and as leading, and also as being something that this witness can know nothing about.)

136 A. I am not competent to say in what capacity Mr. Drake looked after the business of the land grant at Washington.

Q. But he was the vice-president of the company as well as act- 406
ing as trustee?

A. Yes, sir. He was vice-president of the St. Paul & Sioux City Railroad Company, after the sale of that company's road to the Omaha until, I think, 1887.

Q. And all that time the St. Paul & Sioux City Railroad Company, in its name, maintained a land department, did it not, here in this city, and had an office which was called the office of the land commissioner of that company?

A. I think that it could not be held that the St. Paul & Sioux City Railroad Company, as such, maintained the office of the land commissioner, for the reason that all expenses connected with that 407
office were paid by the trustees.

Q. It was maintained in its name, was it not?

A. It was known as the office of the land commissioner of the St. Paul & Sioux City Railroad Company, but the expenses were defrayed by the trustees.

Q. They defrayed it out of the lands that were granted to the St. Paul & Sioux City Railroad Company?

A. They defrayed it out of the lands in trust.

Q. Out of the lands in trust which were conveyed to the St. Paul
408 & Sioux City Railroad Company in aid of its road?

A. Yes, sir; there was no other property.

Recross examination by Mr. WILSON:

137 Q. Was, or was not, Mr. Drake a large stockholder of the stock to secure which these lands were granted by the Drake & Wilder trust deeds?

(Objected to as immaterial, incompetent, and irrelevant.)

409 A. He was a holder of a large amount of special stocks under each of the trusts referred to.

Q. Was not his management, so far as you observed it, with reference to the interests of the trustees, and their rights, under those trust deeds?

(Objected to as immaterial, incompetent, and irrelevant.)

A. I think it was.

Q. Was there any list of any lands kept in the office belonging to the railroad company, except those that fell within those trusts or under those trusts?

(Objected to as immaterial, incompetent, and irrelevant.

410 A. Yes, sir.

Q. What?

A. The land department contains the records of all lands which had ever enured to the benefit of the St. Paul & Sioux City Railroad Company. Those which had been disposed of prior to the date of those trusts, as well as those which were embraced in the trusts.

Q. But after the date of those respective trusts, has that land office had anything to do with the disposition of any of the lands except those that fell within the trusts?

A. It had not.

411 *Certificate to complainant's Exhibits E, F, G.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Aug. 21, 1893.

138 I, S. W. Lamereux, Commissioner of the General Land Office, do hereby certify that the annexed copies of (one) letter addressed to W. P. Jewett, dated February 17, 1890, (two) letter addressed to Curtis and Burdett, dated February 17, 1890, and
412 (three) letter from James E. Moore, dated February 20, 1890, are true and literal exemplifications of the originals on file and of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] (Signed) S. W. LAMEREUX,
Commissioner of the General Land Office.

COMPLAINANT'S EXHIBIT E.

4-3623.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 413
Washington, D. C., Feb. 17, 1890.

W. P. JEWETT,
Land Commissioner, St. Paul & Sioux City Railway Co., St. Paul, Minnesota.

SIR: In compliance with the direction of the Secretary of the Interior, given and contained in his decision of January 23, 1890, in the case of Boyd W. Randall vs. St. Paul & Sioux City Railway Company, demand is hereby made upon you as land commissioner of said company, and through you on the said St. Paul & Sioux City Railway Company for the reconveyance to the United 414
States of title to the tract or parcel of land in the State of Minnesota known and described as the south half of the northeast quarter (S. $\frac{1}{2}$ NE. $\frac{1}{4}$) section twenty-nine, township 111 N., range twenty-five W., held to have been improperly approved, certified,
139 and conveyed on account of the grant in aid of the construction of said company's road.

In the event that compliance with this demand be not made within ninety days, the papers will be transmitted to the Secretary of the Interior, as directed by him, for submission to the Attorney General with a view to instituting suits, as provided by act of 415
March 3, 1887, for the restoration to the United States of the title to the land described.

A copy of the decision of January 23, 1890, is enclosed herewith, and the time within which answer may be made by the company begins to run from the date of receipt by you of this demand.

Curtis & Burdett, of this city, attorneys for the company, are informed respecting this demand by letter of even date.

Very respectfully,

L. A. GROFF, *Commissioner.* 416

COMPLAINANT'S EXHIBIT F.

4-3623. GENERAL LAND OFFICE,
Washington, D. C., Feb'y 17, 1890.

CURTIS & BURDETT,
Attys. St. Paul and Sioux City Railway Co.

SIRS: By Letter F of this date, addressed to W. P. Jewett, land commissioner, demand is made upon the St. Paul & Sioux City Railway Company (under act of March 3, 1887, and decision by the Secretary of the Interior, dated January 23, 1890), for the reconveyance of the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ sec. 29, town. 111 N., range 25 417
W., Marshall land district, Minnesota. Case of Boyd W. Randall vs. St. P. & S. C. R'y Co.

Very respectfully,

W. M. STONE,
Assistant Commissioner.

140 COMPLAINANT'S EXHIBIT G.

[Omaha line St. Paul & Sioux City Railroad. Land department, James E. Moore, land commissioner.]

418 ST. PAUL, MINN., *Feb. 20, 1890.*

HON. L. R. GROFF,
Commissioner General Land Office, Washington, D. C.

DEAR SIR: Will you please cause the fact to be noted in your office that communications intended for the land commissioner of the St. Paul & Sioux City Railroad Company should be addressed to me as such officer?

It has happened of late that communications intended for me
419 have been addressed to W. P. Jewett as land commissioner of this company.

Yours, respectfully, J. E. MOORE,
420 *Land Commissioner.*

141 [Title of cause.]

Stipulations as to complainant's Exhibit B.

It is hereby stipulated and agreed that complainant's Exhibit B,
421 introduced in evidence in the above-entitled cause, to wit, a tabular statement showing the land grants made by Congress for the construction of railroads, wagon roads, canals, and river improvements, with data relative thereto, transmitted by S. M. Stockslager, Acting Commissioner, to Hon. William F. Vilas, Secretary of the Interior, under date of March 8, 1888, may be used upon the hearing of the above-entitled cause, without printing the same in the trial record herein; reserving to the defendants, however, the objections thereto taken at the time said statement was introduced in evidence.

Dated this 26th day of March, 1894.

ROBT. G. EVANS,
Of Counsel for Complainant.
WILSON & BOWERS,
Of Counsel and Solicitors for Defts.

DEFENDANT'S EXHIBIT A.

This indenture, made this 17th day of April, in the year of our Lord one thousand eight hundred and eighty-two, between W. Boright and Christina Boright, his wife, party of the first part, and L. Quackenbush, party of the second part, witnesseth:

423 That the said party of the first part, in consideration of the sum of eight hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged,
142 does by these presents grant, bargain, sell, release, and quit-claim, to the said party of the second part, his heirs, and assigns forever, all the following piece or parcel of land, lying and being in the county of Le Sueur and State of Minnesota, described
424 as follows, to wit:

The south half of the northeast quarter of section twenty-nine (29), town one hundred and eleven, range No. twenty-five (25) west.

To have and to hold the above quit-claimed premises, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to the said party of the second part, his heirs and assigns forever.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. BORIGHT. [SEAL.] 425
CHRISTINA BORIGHT. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. R. DOESCHER,
Witness to W. Boright.
E. P. HUNTINGTON,
A. R. DOESCHER,
Witnesses to Christina Boright.

STATE OF MINNESOTA,
County of Le Sueur, ss:

On this 17th day of April, A. D. 1882, before me, a notary public in and for said county, personally appeared W. Boright, to me personally known to be the same person described in and who executed 426 the foregoing deed, and acknowledged that he executed the same for the uses and purposes therein expressed.

[NOTARIAL SEAL.] A. R. DOESCHER,
Notary Public, Minn.

143 STATE OF MINNESOTA,
County of Le Sueur, ss:

On this first day of July, 1882, before me personally appeared Christina Boright, to me known to be the identical person who exe- 427 cuted the within deed and who acknowledged that she executed the same freely and voluntarily and for the uses and purposes therein expressed.

[NOTARIAL SEAL.] A. R. DOESCHER,
Notary Public, Minn.

[Title of cause.]

Order appointing special master.

Pursuant to the stipulation of the parties hereto attached, dated March 21, 1894.

It is ordered that William A. Spencer, esq., clerk of the United 428 States district court in and for the district of Minnesota, be, and he is hereby, appointed as of April 1st, 1893, as a special master to take and report the testimony in the above-entitled cause, and that all testimony which has heretofore been or may hereafter be taken before him in said cause, or before other officers agreed upon by the parties and transmitted to him, together with all records, documents, and stipulations filed with him as evidence in said cause, be by him transmitted and reported to the clerk of the United States circuit

429 court in which this case is pending, and that all objections to testimony so transmitted and reported as provided in said stipulation be reserved to the parties herein, as is therein provided.

144 It is further ordered that this order be entered nunc pro tunc as of April 1st, 1893.

Dated March 29th, 1894.

By the court.

430 ALFRED D. THOMAS, *Judge.*

[Title of cause.]

Stipulation for appointment of special master.

It is hereby stipulated and agreed by and between the complainants and defendants in the above-entitled cause that the testimony taken upon the part of the complainant and defendants herein before William A. Spencer, clerk of the United States district court, in and for said district, as a master agreed upon for such taking, together with all testimony taken before other officers within or without the
431 State of Minnesota by stipulations heretofore entered into, or upon notice, shall be filed by and through said Spencer in the office of the clerk of the United States circuit court above named, and that said testimony shall have the same effect in all respects and be used as evidence upon the trial of said cause as fully as if regularly taken before a master in chancery appointed by said court.

It is further stipulated that an order shall be made by said court nunc pro tunc as of April 1st, 1893, appointing said Spencer as special master to take and report testimony in said cause.

432 It is further stipulated and agreed that neither of the parties hereto waive any objections to the competency, relevancy, or materiality of the testimony so taken, or any other objection saved and reserved by the stipulations for taking any portion of said testimony
145 or by objections made at the time witnessess were examined or records introduced, but that such objections and all thereof are reserved, to be urged upon the hearing of said cause in said court.

Dated March 21st, 1894.

433 ROBT. G. EVANS,
Special Asst. U. S. Attorney, of Counsel for Complainant.

434 WILSON & BOWERS,
435 *Attorneys for Defendants.*

146 United States circuit court for the district of Minnesota.
a22 Term minutes, June term, A. D. 1894. August 16th, 1894.

Thursday morning. Court opened pursuant to adjournment.

Present: Hon. John A. Williams, judge; Hon. E. C. Stringer, U. S. district attorney.

UNITED STATES OF AMERICA
vs.
ST. PAUL & SIOUX CITY RAILROAD COMPANY, John Kapiska and Mary, his wife, whose given name is unknown; Livingston Quackenbush and Mary Quackenbush, his wife, whose given name is unknown; Herman Kapiska and Jane Kapiska, his wife, whose given name is unknown, and Alfred J. Moler. } C. Eq. No. 656. a23

This cause regularly coming on for hearing, upon the pleadings, a24
final proofs, and arguments of counsel, the complainant appears, by its solicitor, Robert G. Evans, and all the defendants by their solicitor, Thomas Wilson.

Thereupon defendants' solicitor files a written motion to strike out the deposition of Hon. F. W. Lamoreux, Commissioner of the
147 General Land Office, also the deposition of W. F. McGee, of the railroad division of the Land Office.

Whereupon the court, after hearing the arguments of said solicitors, and being fully advised in the premises, sustains said motion. And it is hereby ordered that the depositions of said-named parties be, and they are hereby, suppressed and stricken out. a25

Defendants' said solicitor also, orally and in open court, enters a motion to strike out complainant's Exhibit B, being a tabular statement purporting to show the lands granted by Congress for the construction of railroads, wagon roads, canal and river improvements, with data relevant thereto, transmitted by S. M. Stockslager, Acting Commissioner, to Hon. Wm. F. Vilas, under date of March 8, 1888.

Whereupon said motion, being fully argued by the solicitors for said parties, and the court being fully advised concerning the same, a26
it is by the court ordered that said motion be, and the same hereby is, sustained, and said Exhibit B is stricken out.

Thereupon the above case is argued on behalf of the complainant by Robert G. Evans, its solicitor, and the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

148 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1894. August 17th, 1894.

UNITED STATES
vs.
ST. PAUL & SIOUX CITY RAILROAD COMPANY, John Kapiska, et al. } Eq. C. No. 656. a28

Before Judge Williams.

The above-entitled cause coming on to be further heard, it is further argued on behalf of the complainant by Robert G. Evans, and on behalf of the defendants by Thomas Wilson.

And the hearing of the same not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and
a29 they are hereby, postponed until to-morrow morning at 10 o'clock.

United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1894. August 18th, 1894.

UNITED STATES *vs.* ST. PAUL & SIOUX CITY RAILROAD COMPANY, John Kapiska, et al.	No. C. Eq. 656.

a30 Before Judge Williams.

The above-entitled cause coming on to be further heard, the same is further argued on behalf of the defendants by Thomas Wilson, their solicitor, and the hearing of the same not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are, postponed until Monday morning at 10 o'clock.

149 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1894. August 20th, 1894.

a31 UNITED STATES *vs.* ST. PAUL & SIOUX CITY RAILROAD Company, John Kapiska, et al.	Eq. C. No. 656.

Before Judge Williams.

The above-entitled cause coming on to be further heard, the same is further argued on behalf of the complainant by Robert G. Evans, complainant's solicitor.

Whereupon the same is duly submitted and by the court taken under advisement.

a32 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1894. August 29th, 1894.

THE UNITED STATES OF AMERICA *vs.* ST. PAUL & SIOUX CITY RAILROAD COMPANY, John Kapiska, and Mary Kapiska, his wife, whose given name is unknown; Livingston Quackenbush, and Mary Quackenbush, his a33 wife, whose given name is unknown; Hermann Kapiska, and Jane Kapiska, his wife, whose given name is unknown, and Alfred J. Moler.	Eq. C. No. 656.

Decree.

This cause came on to be heard at the June, A. D. 1894, term of this court upon the pleadings and final proofs therein and was argued by counsel.

150 And thereupon, upon consideration thereof, it is hereby by the court ordered, adjudged, and decreed that the complainant's bill of complaint herein be, and the same is, in all things dismissed, and that the defendants recover of the complainants their costs and disbursements, to be taxed and have execution therefor. a34

Dated this 29th day of August, A. D. 1894.

JOHN A. WILLIAMS, *Judge.*

In the circuit court of the United States, district of Minnesota. Second division.

THE UNITED STATES OF AMERICA, complainant, *vs.* THE ST. PAUL & SIOUX CITY RAILROAD Company and John Kapiska et al., defendants. } No. 656 C. Equity. a35

It is hereby stipulated by and between the attorneys for the above-named parties, respectively, that the venue of each of the above-entitled cases be changed to the third division of said circuit court.

Dated St. Paul, March 1st, 1894.

ROBERT G. EVANS,
Special Asst. United States District Attorney, a36
and of Counsel for the Complainants.

WILSON & BOWERS,
Attorneys for the Defendants.

(Endorsed:) Stipulation for change of venue. Filed Aug. 16th, 1894. Oscar B. Hillis, clerk.

151 Circuit court of the United States in and for the district of Minnesota, third division. a1

THE UNITED STATES OF AMERICA, COMPLAINANT and appellant, *vs.* ST. PAUL AND SIOUX CITY RAILROAD COMPANY, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, respondents. a2

THE UNITED STATES OF AMERICA, *ss:*

To St. Paul and Sioux City Railroad Company, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, greeting: a3

You and each of you are hereby cited and admonished to be and appear at the United States circuit court of appeals for the 8th circuit, to be holden at the city of St. Louis, Missouri, sixty days from
152 and after the date hereof, pursuant to an appeal taken out of and allowed by the circuit court of the United States for the

district of Minnesota, third division, wherein the United States of America is appellant and the St. Paul & Sioux City Railroad Company, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary
4a Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler are respondents, to show cause, if any there be, why the decree in the said appeal mentioned should not be set aside and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, judge of the United States circuit court for the district of Minnesota, this 13th day of November, in the year of our Lord one thousand eight hundred and
a5 ninety-four.

WALTER H. SANBORN,
Circuit Judge.

[Title of cause.]

Now comes the United States of America, complainant in the above-entitled action, by Robert G. Evans, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable the Attorney-General of the United States so to do, and
a6 conceiving itself aggrieved by the decree entered in the above-entitled cause on the 29th day of August, 1894, doth hereby appeal from said decree to the United States circuit court of appeals for the eighth circuit, and said complainant prays that its said appeal may be allowed and that a transcript of the record, proceedings, and
153 papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

ROBERT G. EVANS,
Special Asst. United States Atty.,
a7 *Counsel & Solicitor for Complainant and Appellant.*

Dated November 10, 1894.

And now, to wit, on November 13th, 1894, it is ordered that the appeal in the above-entitled cause be allowed as prayed for.

WALTER H. SANBORN,
Circuit Judge, 8th Circuit.

[Title of cause.]

a8 *Assignment of error.*

And now, in the foregoing-entitled cause and at the time of filing therein of the foregoing and attached petition for appeal, comes the said appellant, the United States of America, by Robert G. Evans, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable Attorney-General of the United States, and says that in the records and proceedings in the above-entitled cause there is manifest error, in this, to wit, that the court erred:

a9 First. In not holding that the land in the bill of complaint described, lying within the place limits of the line of road of The St. Paul & Sioux City Railroad Company, to which preemption

rights in favor of Boyd W. Randall were attached before, at, and after the time the route of said road opposite and past the same was definitely fixed, was excepted from the operation of the
154 grants made by Congress in aid of the construction of the line of said road.

Second. In not holding that the officials of the Land Department, in certifying such land to the State of Minnesota for the benefit of said line, acted without authority of law, and that such action a10
was void.

Third. In not holding that the defendants obtained no right, title, or interest whatever in or to the land in controversy by reason of the certification thereof to the State of Minnesota for the benefit of the line of said road.

Fourth. In holding that, in view of former rulings of the officers of the Land Department and the lapse of time since the land in controversy was certified, the complainant was not entitled to the relief prayed for in its bill. a11

Fifth. In holding that the land involved in this suit had, before the same was commenced, passed into the hands of a bona fide purchaser, through and under The St. Paul and Sioux City Railroad Company, and that, because of this, complainant could not recover.

Sixth. In holding that complainant could not recover because of laches.

Seventh. In holding that complainant could not recover because of the staleness of its claim.

Eighth. In holding that the defendants, other than The St. Paul a12
and Sioux City Railroad Company, were good-faith purchasers of the land in controversy.

Ninth. In holding that the certification to the State of Minnesota for the benefit of The St. Paul & Sioux City Railroad Company, and the conveyance by said State to said company, vested
155 in the said railroad company the legal or any title to the land so certified and conveyed.

Tenth. In holding that although the land in controversy may have been certified without authority, complainant can not, under the act of Congress of March 3, 1887, have such certification set aside if a13
the land has passed into the hands of a bona fide purchaser.

Eleventh. In sustaining the motion of defendants to strike out the interrogatories and cross-interrogatories propounded to the Commissioner of the General Land Office, and his answers thereto, relative to the nonadjustment of the grant in aid of the line of road of the St. Paul & Sioux City Railroad Company, found in the record on pages 34–36, inclusive.

Twelfth. In sustaining the motion to strike out the interrogatories and cross-interrogatories propounded to the chief clerk of the rail- a14
road division of the General Land Office, and his answers thereto, relative to the nonadjustment of the grant in aid of the line of road of the St. Paul & Sioux City Railroad Company, as found in the record on pages 36–42, inclusive.

Thirteenth. In holding that the judgment of the district court of the State of Minnesota set out in the agreed statement of facts

(Record, page 29, subdivision 7), in an action wherein Washington
a15 Boright was plaintiff and Boyd W. Randall was defendant, constituted an estoppel against complainant or in any manner affected

complainant's right to maintain this action.

Fourteenth. In dismissing the complainant's bill of complaint.

Wherefore, the said appellant prays that the decree of the
156 said circuit court of the United States for the district of Minnesota in the above-entitled cause be reversed.

ROBERT G. EVANS,
Special Asst. United States Atty.,
a16 *Solicitor and Counsel for Appellant.*

[Title of cause.]

The complainant in the above-entitled action having appealed from the decree rendered therein dismissing its bill of complaint to the circuit court of appeals of the eighth circuit, and said appeal having been allowed, it is hereby stipulated and agreed by and between the parties to the above-entitled action that in order to save the expense
a17 of reprinting the record in said action on appeal and to expedite the hearing of said appeal the trial record as printed for the hearing in the circuit court, having added thereto the decree, petition for, and order allowing appeal, complainant's assignments of error, and citation, all of which have been duly served, the motion of defendants to strike out the interrogatories, cross-interrogatories, and the answers thereto, propound' to and answered by the Commissioner of the General Land Office and the chief clerk of the railway division of the General Land Office, the stipulation and order changing the venue
a18 of said action, and all orders made and stipulations entered into not now contained in said printed record of the United States circuit court for the district of Minnesota, third division, may be considered and taken by said circuit court of appeals as the full, true, and complete record of all proceedings therein, except that the maps
157 used in the hearing of said cause in the court below may also be used without printing the same in the record of said circuit court of appeals, and all opinions and decisions stipulated as evidence in the court below may be used upon the hearing of the appeal from the printed books in which they appear. It is further
a19 ordered and agreed that the complainant need not file with the clerk of said circuit court of appeals to exceed 12 copies of said printed record.

ROBERT G. EVANS,
Solicitor and Counsel for Complainant and Appellant.

WILSON & BOWERS,
Solicitors for Respondents.

a20 All the foregoing endorsed. Filed November 13th, 1894. Oscar B. Hillis, clerk.

158 And on the third day of December, A. D. 1895, an appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. December term, 1894.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL AND SIOUX CITY RAILROAD CO. ET. AL. } No. 565.

The clerk will enter my appearance as counsel for the appellant.

ROBT. G. EVANS,
Spl. Asst. U. S. Atty., for Appellant.

(Endorsed:) "U. S. circuit court of appeals, eighth circuit. December term, 1894. No. 565. United States of America, appellant, vs. St Paul & Sioux City R. R. Co. et al. Appearance. Filed Dec. 3, 1894. John D. Jordan, clerk. Robt. G. Evans, special ass't U. S. attorney, counsel for appellant."

And on the third day of December, A. D. 1895, an appearance of counsel for appellees was filed in the clerk's office of said circuit court of appeals, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. December term, 1894.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE ST. PAUL & SIOUX CITY RAILROAD CO. et al. } No. 565.

159 The clerk will enter my appearance as counsel for the defendants' appellees.

THOMAS WILSON.

(Endorsed:) "U. S. circuit court of appeals, eighth circuit. December term, 1894. No. 565. United States, appellant, vs. St. Paul & Sioux City R. R. Co. et al. Appearance. Filed Dec. 3, 1894. John D. Jordan, clerk. Thomas Wilson, counsel for all appellees."

And on the fifteenth day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. December term, 1894. Tuesday, January 15th, 1895.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL AND SIOUX CITY RAILROAD COMPANY ET AL., APPELLEES. } No. 565. Appeal from the circuit court of the United States for the district of Minnesota.

This cause having been heretofore advanced and called for hearing this day, argument was commenced by Mr. Robert G. Evans in behalf of the

appellant, continued by Mr. Thomas Wilson in behalf of the appellees, and concluded by Mr. Robert G. Evans for the appellant. Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

160 And on the sixth day of May, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

161 United States circuit court of appeals, eighth circuit. May term, A. D. 1895.

UNITED STATES OF AMERICA, APPELLANT, *vs.* ST. PAUL AND SIOUX CITY RAILROAD COMPANY, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, appellees.	No. 565. Appeal from the circuit court of the United States for the district of Minnesota.

Mr. Robert G. Evans for the appellant.

Mr. Thomas Wilson (Mr. Lloyd W. Bowers was with him on the brief) for appellees.

Before CALDWELL, SANBORN, and THAYER, circuit judges.

SANBORN, J., delivered the opinion of the court:

This is an appeal from a decree dismissing a bill brought by the appellant, the United States, under the act of March 3, 1887 (24 Stat., 556), to restore to the United States the title to eighty acres of land, which at the commencement of the suit was held by the appellee, Alfred J. Mohler. The land in controversy is within the place limits of the grant, by the act of March 3, 1857 (11 Stat., 195), to the Territory and State of Minnesota to aid in the construction of the railroad of the appellee, the St. Paul & Sioux City Railroad Company. At the time of the definite location of the line of the railroad opposite this land, in 1858, preemption rights had attached to it. Notwithstanding that fact the Secretary of the Interior, on August 26, 1864, certified it to the State of Minnesota as a part of the lands granted by the act of March 3, 1857, to aid in the construc-

162 tion of the railroad of the St. Paul & Sioux City Railroad Company. On January 4, 1868, the State conveyed it to the railroad company. By five mesne conveyances the title of the railroad company to this land was transmitted to the appellee, Mohler. His immediate grantor conveyed it to him on May 19, 1891, by a warranty deed with full covenants. He then paid twenty-nine hundred dollars for it in money and property and had no notice of any defects in his title until the subpœna was served upon him in this suit long after he had purchased and completed his payment for the land.

The decree below must be affirmed with costs, because the appellee, Mohler, was at the time of the commencement of this action the holder of the legal title to this land, and he was a bona fide purchaser of it for value without notice of any defects in his title. The reasons for this conclusion are stated at length in No. 464, United States v. The Winona & St. Peter Railroad Company, The Winona & St. Peter Land Company, The Minnesota Land & Investment Company, et als., ... Fed. Rep., ...

Filed May 6, 1895.

163 And on the sixth day of May, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1895.
Monday, May 6, 1895.

THE UNITED STATES OF AMERICA, APPELLANT, *vs.* ST. PAUL AND SIOUX CITY RAILROAD COMPANY, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, appellees.	No. 565. Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed without costs to either party in this court. May 6, 1895.

And on the eighth day of July, A. D. 1895, there was filed in the clerk's office of said United States circuit court of appeals a petition for appeal and assignment of errors which, with the order allowing appeal thereon, are in words and figures following, to wit:

164 United States circuit court of appeals, eighth circuit. May term, A. D. 1895.

UNITED STATES OF AMERICA, APPELLANT, *vs.* ST. PAUL AND SIOUX CITY RAILROAD COMPANY, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, appellees.	No. 565.

Petition for appeal.

Now comes the United States of America, appellant in the above-entitled action, by Robert G. Evans, special assistant United States attorney, hereunto lawfully authorized and directed by the honorable the Attorney-General of the United States so to do, and conceiving itself aggrieved by the decree of said court, entered in the above-entitled cause on the 6th day of May, 1895, doth hereby appeal from said decree to the Supreme Court of the United States; and said appellant prays that its said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States; and further, appellant saith that the matter in controversy in this suit exceeds one thousand dollars ($1,000.00), besides costs, as shown by affidavit hereto attached and made a part hereof.

ROBERT G. EVANS,
Special Asst. U. S. Attorney, Counsel for Appellant.

Dated July 5, 1895.

And now, to wit, on the 25th day of July, A. D. 1895,
165 It is ordered that the appeal in the above-entitled cause be allowed as prayed for.

(Signed) WALTER H. SANBORN,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

United States circuit court of appeals, eighth circuit. May term, A. D. 1895.

UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL AND SIOUX CITY RAILROAD COMPANY, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, appellees. } No. 565.

Affidavit.

STATE OF MINNESOTA,
County of Hennepin, ss:

Robert G. Evans, being duly sworn, upon oath says that he, as special assistant United States attorney, has had charge of the conduct of the above-entitled cause; that the same involves the title to lands situated in the State of Minnesota of the value of at least two thousand dollars ($2,000.00), as he is informed and believes, and that the matter in controversy in the above-entitled action exceeds one thousand dollars ($1,000.00), besides costs.

ROBERT G. EVANS.

Subscribed and sworn to before me this 5th day of July, A. D. 1895.

[SEAL.] ARTHUR M. KEITH,
Notary Public, Hennepin County, Minn.

166 United States circuit court of appeals, eighth circuit. May term, A. D. 1895.

UNITED STATES OF AMERICA, APPELLANT,
vs.
ST. PAUL AND SIOUX CITY RAILROAD COMPANY, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, appellees. } No. 565.

Assignment of errors.

And now, in the foregoing entitled cause and at the time of the filing therein of the foregoing attached petition for appeal, comes the said appellant, the United States of America, by Robert G. Evans, special assistant United States attorney, hereunto lawfully authorized and directed by the Hon. Attorney-General of the United States, and says that in the records and proceedings in the above entitled cause there is manifest error in this, to-wit:

That the court erred:

1st. In holding that the action of the officers of the Land Department, in certifying to the State of Minnesota for the benefit of the St. Paul

& Sioux City Railroad Company the land described in the bill of complaint, lying within the place limits of its grant, to which a pre-emption filing which had subsequently been cancelled was attached at the time of the definite location of the line of said road, though erroneous, was not absolutely void, but was merely voidable, at the suit in equity of the party who had the better right to the title, and that the certification those officers issued conveyed the legal title to the State and its grantees.

2nd. In holding that the United States had no equitable right
167 to the land described in the bill of complaint superior to that of the bona fide purchasers who claimed to have acquired legal title through and under said railroad company before the United States gave any notice of the mistake of the officers of the Land Department in certifying said land or of its claim to recover said land.

3rd. In holding that the immediate and remote grantees of the St. Paul & Sioux City Railroad Company, who were parties to this suit, were bona fide purchasers of the land bought by them respectively.

4th. In holding that the action of the officers of the Land Department, in certifying the land in the bill of complaint described to the State of Minnesota for the benefit of the St. Paul & Sioux City Railroad Company, which was in fact excepted from the operation of the grant in aid of that road, was within the jurisdiction of said officers, and that such certification conveyed any right or title whatever to the said State, the said railroad company, and its grantees.

5th. In holding that the land in controversy having passed to bona fide purchasers the United States can not for this reason recover in said action.

6th. In holding that Alfred J. Mohler was, at the time of the commencement of this action, the holder of the legal title to the land in controversy.

7th. In affirming the decree of the circuit court of the United States for the district of Minnesota.

Wherefore, the said appellant prays that the decree of the said United States circuit court of appeals for the eighth circuit in the above-entitled cause be reversed.

ROBERT G. EVANS,
Special Asst. U. S. Attorney, Counsel for Appellant.

168 (Endorsed:) "No. 565. Circuit court of U. S., district of Minnesota. United States of America, complainant, vs. St. Paul & Sioux City Ry. Co. et al., defendants. Petition for appeal. Affidavit and assignment of error. Filed Jul. 8, 1895. John D. Jordan, clerk."

And on the thirty-first day of July, A. D. 1895, a citation was filed in the clerk's office of said United States circuit court of appeals in said cause, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned.

169 United States circuit court of appeals, eighth circuit. May term, A. D. 1895.

UNITED STATES OF AMERICA, APPELLANT,
v.
ST. PAUL AND SIOUX CITY RAILROAD COMPANY, JOHN KAPISKA, MARY KAPISKA, LIVINGSTON QUACKENBUSH, MARY QUACKENBUSH, HERMAN KAPISKA, JANE KAPISKA, AND ALFRED J. MOHLER, APPELLEES. } No. 565.

Citation.

UNITED STATES OF AMERICA, *ss:*

To St. Paul & Sioux City Railroad Company, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler, greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States in the city of Washington, D. C., thirty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the United States circuit court of appeals for the eighth circuit, wherein the United States of America is appellant and the St. Paul & Sioux City Railroad Company, John Kapiska, Mary Kapiska, Livingston Quackenbush, Mary Quackenbush, Herman Kapiska, Jane Kapiska, and Alfred J. Mohler are respondents, to show cause, if any there be, why the decree in the said appeal mentioned should not be set aside and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, judge of the United States circuit court of appeals for the eighth circuit, this 25th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

WALTER H. SANBORN, *Judge.*

Due service of the within citation is hereby admitted this 25th day of July, 1895.

THOMAS WILSON,
WILSON & BOWERS,
Solicitors for Defendants.

(Indorsed:) Original. No. 565. Circuit court of U. S., district of Minnesota. U. S. of America, complainant, vs. St. Paul & Sioux City Ry. Co. et al., defendants. Citation. Filed July 31, 1895. John D. Jordan, clerk.

170 United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing 169 pages contain full, true, and complete copies of all the pleadings, proceedings, and

record entries, including the opinion of said circuit court of appeals, in the case of the United States of America, appellant, vs. St. Paul & Sioux City Railroad Company et al., appellees, No. 565, May term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original citation in said cause, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals at the city of St. Louis, Missouri, this 12th day of August, A. D. 1895.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Indorsement on cover:) Case No. 15993. Term No., 703. The United States, appellant, vs. The St. Paul and Sioux City Railroad Company et al. U. S. cir. ct. of appeals, eighth circuit. Filed August 16, 1895.

165-463
+48
165-463
+48

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT, *v.* THE WINONA AND ST. PETER RAILROAD Company et al.	No. 321.
THE UNITED STATES OF AMERICA, APPELLANT, *v.* THE ST. PAUL AND SIOUX CITY RAILROAD Company et al.	No. 322.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.



Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE WINONA AND ST. PETER RAILROAD Company et al. } No. 321.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE ST. PAUL AND SIOUX CITY RAILROAD Company et al. } No. 322.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

These two cases involve substantially the same single question, and for that reason are argued and will be submitted together.

They arise under the *Act of Congress of March 3, 1887* (24 Stat., 556), entitled "An act to provide for the ad-

justment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." It provides in section 1:

> That the Secretary of the Interior be, and is hereby, authorized and directed to adjust, in accordance with the decision of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.
>
> SEC. 2. That if it shall appear upon the completion of such adjustments, respectively, or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grants from the United States to aid in the construction of the railroads, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued to such lands, and to restore the title thereof to the United States.
>
> SEC. 3. That if in the adjustment of said grants it shall appear that the homestead or preemption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant, or the withdrawal of public lands from market, such settler, upon application, shall be reinstated in all his rights and allowed

> to perfect his entry by complying with the public-land law: *Provided*, That he has not located another claim, or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated, within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any; and if there be no such purchasers, then to *bona fide* settlers residing thereon.

For a long time prior to March 2, 1885, it had been uniformly held and ruled by the Secretary of the Interior and the other officers of the Land Department of the United States that the line of a railroad became definitely fixed so as to attach the grant to the land embraced therein as soon as surveyed and staked off on the earth's surface.

On the 2d day of March, 1885, it was decided by the Supreme Court of the United States in the case of *Kansas Pacific Railway Company* v. *Dunmeyer* (113 U. S., 629) that the line of definite location of a railroad which determines the rights of railroad companies to land under land-grant acts of Congress is definitely fixed within the meaning of those acts *by filing the map of its location with the Commissioner of the General Land Office at Washington.*

This decision of the Supreme Court and those which followed upon it are the decisions referred to in the act of Congress of March 3, 1887.

In both of the cases here presented homestead and preemption rights had attached. The entries had been

erroneously, it is claimed, canceled, and the lands had been certified by the Secretary of the Interior to the State of Minnesota before the map of definite location of the railroad had been filed in the office of the Secretary of the Interior.

CASE NO. 321.

This suit was brought under the provisions of the *Act of Congress of March 3, 1887* (24 Stat., 556), to provide for the adjustment of land grants in aid of the construction of railroads.

On the 3d of March, 1857, Congress passed an act (11 Stat., 195) making a grant of lands to the Territory of Minnesota to aid in the construction of certain railroads. The language of the act is:

> That there be, and is hereby, granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads * * * from Winona via St. Peters, to a point on the Big Sioux River south of the forty-fifth parallel of north latitude * * * every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of preemption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts

> of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of preemption have attached, as aforesaid, which lands * * * shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said road or branches, and selected for and on account of each of said roads or branches: *Provided further*, That the lands hereby granted by and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

On the 22d of May of the same year the legislature of the Territory of Minnesota passed an act to execute the trust created by the act of Congress, and among other things authorized the corporation known as the Transit Railroad Company to construct and operate a railroad from Winona to the Big Sioux River, by way of St. Peter, and granted to the company, to aid in the con-

struction of the road, the land ceded to the Territory by the act of Congress.

The Territory of Minnesota became a State and was admitted into the Union in 1857.

All the property, rights, and franchises of the Transit Railroad Company passed to and became the property of the State of Minnesota in March, 1862, and on that date the legislature of Minnesota passed an act transferring to the Winona and St. Peter Railroad Company all the property, rights, and franchises which the State had acquired from the Transit Railroad Company.

By an *Act of 3d of March, 1865* (13 Stat., 526), Congress increased the quantity of land granted to the State of Minnesota by the act of 1857 to ten sections per mile for all the roads and branches, subject to the same limitation attached to the original grant, and enlarged the limits within which indemnity land could be selected to 20 miles from the line of the roads.

The third section provided:

> That any lands which may have been granted to the Territory or State of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted, and that any lands which may have been so granted shall be strictly applied, in accordance with the terms and conditions of said act or acts, unless subsequently modified by law.

The sixth section of the act provides:

> That the lands hereby and heretofore granted to said Territory or State of Minnesota shall be dis-

posed of by said State for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of 10 consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with this requirement, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite to and within a limit of 20 miles of the line of said section of road thus completed, extending along the whole length of said completed section of 10 miles of road, and no farther. And when the governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, 10 consecutive miles in extent, connecting with the preceding section or with some other first-class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and situated opposite to and within the limit of 20 miles of the line of said completed section of road or roads, and extending the length of said section, and no farther, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment, and so, from time to time, until said roads and branches are completed. And when the governor of said State shall so certify, and the Secretary of the Interior shall be satisfied that the whole of any one of said roads and branches is completed in a good, substantial, and workmanlike manner, as a first-class railroad, the said Secretary of the Interior shall issue

> to the said State patents to all the remaining lands granted for and on account of said completed road and branches in this act, situated within the said limits of 20 miles from the line thereof, throughout the entire length of said road and branches: *Provided*, That no land shall be granted or conveyed to said State under the provisions of this act on account of the construction of any railroad or part thereof that has been constructed under the provisions of any other act at the date of the passage of this act and adopted as a part of the line of railroad provided for in this act, etc.

An "Agreed statement of facts" will be found (pp. 42–49, Rec.). Among these (p. 45) it is agreed that Exhibit A, annexed to the answer of the Winona and St. Peter Railroad Company, is a list of the lands in the bill of complaint herein described, which shows the dates that each tract was certified to the State by the Secretary of the Interior of the United States and the company for which it was so certified.

"Exhibit A" will be found on pages 27 and 28 of the record, from which it appears that none of the lands were certified earlier than February 28, 1872, except two pieces on December 1, 1862, and none later than June 6, 1879.

It is a fact agreed (Rec., 45)—

> That it appears from the records and files of the General Land Office that homestead entries or preemption filings, prima facie regular and valid, were made upon all the several tracts of land in the bill of complaint described, by the persons and at the place and times therein set forth. That such proceedings were had thereon that the proper officer,

> before said lands were certified to the State aforesaid, canceled all such entries or filings at the times, in the manner, and for the reasons set forth in the schedule hereto attached, marked Exhibit 9 (Rec., 55), and made part hereof; which schedule further shows all subsequent attempted entries of said lands, or filings thereon, and the disposition of such attempted entries or filings.

It appears from Exhibit 9 (Rec., 55) that, with the exception of two entries in 1857, all of the entries were made at dates ranging from the 12th of May, 1862, to the 11th of July, 1864, much the larger number of them being in March, April, May, and June, 1864.

It further appears that nearly all of the cancellations of these entries were made on June 18, 1869, a few were made in 1868, and some in 1872, 1873, and 1874. It appears as to many of these entries that no cancellations were made at all.

It appears that all of the cancellations were ex parte and without notice to the entry holders.

That in nearly every case they were made upon the testimony of the private agents of the Winona and St. Peter Railroad Company.

That the governor of the State of Minnesota conveyed to the defendant company all the lands described in the bill of complaint, except those involved in the suit against the St. Paul and Sioux City Railroad Company.

It is a fact agreed (Rec., 43)—

> That the said Transit Railroad Company surveyed and staked out its line of road on the face of the earth from Winona westwardly to the west line of range 31 on or before the 17th day of July, 1857;

and the line so surveyed and staked out was * * * adopted as the line of definite location of said road. That said company filed its map, showing the line so surveyed, staked out and adopted as its line of definite location with the Secretary of Interior of the United States on the 29th day of July, 1858, and not before. That said Winona and St. Peter Railroad Company surveyed, staked out, and fixed its line of road on the face of the earth from said west line of range 31 to the west line of range 37, on or before the 9th day of April, 1864. * * * And on April 12, 1864, filed in the office of the register of the United States land office at St. Peter, Minn. (that being the district in which said line is located), a map, which was by the register of that office forwarded to the Commissioner of the General Land Office at Washington, D. C., on April 15, 1864, and not before. * * * And on the 28th of April, 1864, said map was returned by the Commissioner of the General Land Office to the said local office. * * * And on August 3, 1864, a map of the definite location of the line of said road, as aforesaid surveyed and staked out, was filed in the office of the Commissioner of the General Land Office. * * * That said Winona and St. Peter Railroad Company surveyed and staked out its line of road on the face of the earth from the said west line of range 37 to and beyond the west line of range 38 on or before the 2d of November, 1866, and filed its map, showing the line so surveyed and staked out as its line of definite location, in the office of the Secretary of the Interior, on the 23d of February, 1867.

The opinion of the circuit court of appeals, presenting the views taken by that court of the facts and of the law, and the reasoning thereon, will be found in Rec., 393–412.

THE ASSIGNMENT OF ERRORS.

1. In holding that the actions of the officers of the Land Department in certifying to the State of Minnesota, for the benefit of the Winona and St. Peter Railroad Company, the lands within the place limits of its grant, on which homestead entries, or preemption filings, which had subsequently been canceled, existed at the time of the definite location of its line, though erroneous, were not absolutely void, but were merely voidable at the suit in equity of the party who had the better right to the title, and that the certifications these officers issued conveyed the legal title to the State and its grantee.

2. In holding that the United States had no equitable right to the lands described in the bill of complaint superior to that of the bona fide purchasers who claimed to have acquired legal title through and under said railroad company before the United States gave any notice of the mistake of the officers of the Land Department in certifying said lands or of its claim to recover said lands.

3. In holding that the immediate and remote grantees of the Winona and St. Peter Railroad Company, who were parties to this suit, were bona fide purchasers of the lands bought by them, respectively.

4. In holding that the lands within the place limits of the grants to the Winona Company and within the indemnity limits of the grants to the St. Paul and Sioux City Company, upon which homestead entries and preemption filings that were subsequently canceled by the proper officers of the Land Department existed at the time of the definite location of the line of the railroad of

the Winona Company, were, after these cancellations were made, properly selected and rightfully certified to the Sioux Company by the officers of the Land Department.

5. In holding that the action of the officers of the Land Department in certifying lands to the State of Minnesota for the benefit of the Winona and St. Peter Railroad Company which were in fact excepted from the operation of the grants in aid of that road was within the jurisdiction of said officers, and that such certification conveyed any right or title whatever to the said railroad company and its grantees.

6. In holding that the action of the officers of the Land Department in certifying lands to the State of Minnesota for the benefit of the St. Paul and Sioux City Railroad Company, which were in fact excepted from the operation of the grants in aid of that road, was within the jurisdiction of said officers, and that such certification conveyed any right or title to the railroad company and its grantees.

7. In holding that the lands in controversy, having passed to bona fide purchasers, the United States can not for this reason recover in said action.

8. In affirming the decree of the United States circuit court for the district of Minnesota.

ARGUMENT.

THE CERTIFICATION, BY THE SECRETARY OF THE INTERIOR, TO THE STATE OF MINNESOTA OF THE LANDS DESCRIBED IN THE BILL OF COMPLAINT, FOR THE BENEFIT OF THE WINONA AND ST. PETER RAIL-

ROAD COMPANY, AFTER HOMESTEAD AND PREEMPTION RIGHTS HAD ATTACHED TO SUCH LANDS AND WHILE THE LANDS WERE STILL COVERED BY THESE ENTRIES, WAS AN ACT NOT MERELY VOIDABLE, BUT ABSOLUTELY VOID, BECAUSE CONTROL OVER AND POWER OF DISPOSITION OF SAID LANDS BY THE INTERIOR DEPARTMENT HAD CEASED.

It is conceded by the learned judge who delivered the opinion of the circuit court of appeals (Rec. 397):

> That the existence of a preemption filing upon a tract of land at the time of the definite location of the line of a land-grant railroad excepted the tract from the grant to the railroad to the same extent as the existence of a homestead entry upon it would have done.
>
> Under this concession it must be admitted that the decision of the officers of the Land Department, evidenced by their certificates, that the grants to the Winona Railroad Company attached to the lands in controversy, was erroneous. They should have held that these lands were excepted from these grants by the existence of homestead entries and preemption filings upon them when the line of the railroad was definitely located, and that these lands did not fall within the grants to that company when the entries and filings were subsequently canceled.

But it is argued in the opinion that these actions, although erroneous—and hence voidable—were not void, but operated to pass the legal title to the lands to the grantees. The reason given for this conclusion being stated in the following words:

> The Land Department of the United States, then, including in that term the Secretary of the Interior,

> the Commissioner of the General Land Office, and their subordinate officers, constitutes a special tribunal under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands *it is authorized to dispose of*, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant; whether or not it has so far complied with its conditions that it is entitled to its benefits; whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or preemption laws for a portion of the public domain that is subject to its disposition, that tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws; whether or not the land claimed was subject to preemption or to entry for a homestead, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land.

But this assumes the very position here controverted, to wit, that the lands here in question were lands which the Secretary of the Interior "is authorized to dispose of." It is conceded that at the time these lands were certified to the State of Minnesota they were already covered by homestead and preemption entries, and the question which lies at the foundation of this case is, Had the officers of the Land Department lawful power, authority, and jurisdiction to dispose of lands in which homestead and preemption claims had attached?

In *United States* v. *Stone* (2 Wall., 535) Mr. Justice Greer, speaking for the court, said:

> Patents are sometimes issued unadvisedly, or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority, etc. (See, too, *Maxwell Land Grant Case*, 121 U. S., 380; *Wright* v. *Roseberry*, 121 U. S., 516; *United States* v. *San Jacinto Tin Co.*, 125 U. S., 284.)

In *Hastings, etc., R. R. Co.* v. *Whitney* (132 U. S., 361) the court said:

> In the light of these decisions the almost uniform practice of the Department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, preemption settlement, sale, or grant until the original entry be canceled or declared forfeited, in which case the land reverts to the Government as part of the Government domain, and becomes again subject to entry under the land laws.

In *Whitney* v. *Taylor* (158 U. S., 88) the whole subject was fully discussed by Mr. Justice Brewer, and the cases compared and distinguished. Referring to such entries he says (p. 91):

> But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry

> of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. * * *
>
> In this respect notice may also be taken of the rule prevailing in the Land Department, where the filing of the declaratory statement is recognized as the assertion of a preemption claim, which excepts a tract from the scope of a railroad grant like this. (See *Weeks* v. *Bridgman*, 159 U. S., 545.)

This question, however, can be no longer considered as open to debate since the decision of this court in *Burfenning* v. *Chicago and St. Paul Ry.* (163 U. S., 323), where it is said:

> But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department can not override the expressed will of Congress or convey away public lands in disregard or defiance thereof.

It is a fact agreed in this case (Rec., 45)—

> That it appears from the records and files of the General Land Office that homestead entries or preemption filings, prima facie regular and valid, were made upon all the several tracts of land in the bill of complaint described by the persons and at the place and times therein set forth.

The record shows that these entries were all duly made

of record, and, as was said in *Whitney* v. *Taylor* (*supra*, p. 91):

> Such an entry attached to the land a right which the road can not dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the greatest dangers to actual settlers and would be subversive of the principles upon which the munificent railroad grants are based.

These entries do appear to have been canceled by the officers of the local land office, but such action on their part was, upon the facts hereinbefore recited, as unwarranted and as void as were the acts of the officers of the Land Department in certifying these lands. It is among the facts agreed (p. 45)—

> That such proceedings were had thereon; that the proper officer, before said lands were certified to the State aforesaid, canceled all such entries or filings at the times, in the manner, and for the reasons set forth in the schedule hereto attached, marked Exhibit 9. (To be found on p. 55.)

These cancellations when made were without any notice whatever to the parties to be affected thereby, were altogether ex parte, and were made solely upon the information and testimony of the agent of the Winona and St. Peter Railroad Company, to which the lands were subsequently conveyed.

In *Castello* v. *Bonnie* (15 L. D., 354) an entry made August 19, 1882, was canceled June 15, 1883, "upon a report by a special agent, made in the interest of a lum-

ber company, that the entry was fraudulent." It was held that the cancellation of an entry upon the report of a special agent is contrary to law and the established rules of evidence.

An examination of Exhibit 9 (Rec., 55–72) discloses the fact that in nearly every instance the entries made on the land involved here were canceled upon the examination made of the lands by "Theodore G. Carter, a land surveyor employed by the Winona and St. Peter Railroad Company," and in each case the further fact appears that there was "no evidence of inability to find entrymen."

A large majority of these cancellations of the homestead entries were made on June 18, 1869, and in every instance does it appear that "Carter examined the land for the company."

The entrymen in all these cases had complied with the law and had acquired rights of which they have been deprived without due process of law and without notice to them of the proceedings by which their rights were sought to be divested.

In *Lewis* v. *Shaw* (57 F. R., 516) land had been entered in due form and paid for by one Miller, under the provisions of the act of Congress approved June 3, 1878, for the sale of timber lands in California, Oregon, Washington, etc. Miller gave a mortgage on the land, under which it was sold and passed through several hands. In March, 1885, the Commissioner of the General Land Office, upon a report made by a special agent of the Interior Department, representing said land to be agricultural

land and therefore not subject to sale as timber land, and that said entry was made for the benefit of Ryan (mortgagee), notified Miller that his entry was held for cancellation.

Upon a hearing and appeal to the Secretary of the Interior the land was adjudged to be timber land, but the entry was canceled on the ground that it had been made for the benefit of Ryan. No notice of these proceedings was given to Lewis, who was the last purchaser of the land, although the fact of his purchase and his address were well known to the agent and all the officers of the Land Department. On a bill filed by Lewis, the circuit court held:

> The power of the Commissioner of the General Land Office to cancel an entry of public land for sufficient cause can not be denied, but his power is limited, and not to be exercised in an arbitrary manner so as to divest the property rights of individuals lawfully acquired. * * * It is also established by the decisions that by a valid entry of public lands rights thereto become vested, and the land becomes subject to all the incidents of private ownership, including taxation, and the owner may transfer it before the legal title passes from the Government by the issuance of a patent. *United States* v. *Budd* (144 U. S., 154). Under this rule the complainant, by the purchase of the land in question, after the completion of Miller's entry thereof, acquired such an interest that he was entitled to notice of any attack upon the validity of said entry and an opportunity to appear in any proceedings before the tribunal authorized to determine questions raised by such an attack. In this country property

rights of an individual can not be lawfully divested without granting him a hearing. *Windsor* v. *McVeigh* (93 U. S., 274).

In *Risdon* v. *Davenport*, decided by the supreme court of South Dakota January 17, 1894 (57 N. W. Rep., 482), after stating the facts, the court said:

> Upon these facts Conway became the equitable owner of the land. Until the patent was issued to him the Government held the legal title as his trustee. Such facts would give Conway a vested interest in the land, of which he could be divested only by a finding by a competent tribunal that such facts did not exist. Assuming, without so deciding, that the Commissioner of the General Land Office was such competent tribunal, * * * neither he nor the register and receiver could arbitrarily or voluntarily cancel Conway's entry. * * *
>
> In this case, whatever may be the real facts, those stated in the answer show a *bona fide* entry of and payment for this land by Conway and an attempted cancellation of such entry by the Commissioner of the General Land Office, was without jurisdiction and consequently without authority of law.

In *Stimson Land Co.* v. *Ranson* (62 F. R., 426), the rights of entrymen and the power of the Land Department of the Government to impair or divest such rights are very fully considered by the United States circuit court, district of Washington, and the conclusion reached that a decision by an officer of an executive branch of the Government canceling an entry after it has been allowed and the land paid for, and before the legal title has passed from the Government, is not binding on the courts if supported only by a general conclusion of fraud

and that the entry was not made in good faith with intent on the part of the entryman to take the land for his exclusive use and benefit.

The opinion of the circuit court of appeals appears to proceed upon the assumption that the cancellation of these entries was final and conclusive and can not be impeached in this proceeding. These entries were matters of public record, and the proceedings for their cancellation were parts of the same record, and no parol or other extrinsic evidence need be resorted to to ascertain the facts. From the record so produced it is manifest that the cancellations thus attempted to be made were on proceedings taken without notice to the parties in interest and upon the application and reports alone of the special agent of the railroad company which was seeking to acquire them, and they were, for these reasons, we submit, invalid and of no legal effect.

So that the case really stands upon the view taken and enforced in the opinion of the lower court that the certification of these lands by the Secretary of the Interior to the State of Minnesota is conclusive evidence that that State and those holding under her are entitled to the lands under the laws of the United States, and that the certificate operated to pass a good and indefeasible title to said lands.

This view, we respectfully submit, involves an error which is expressed in the opinion in the statement that:

> The Land Department of the United States * * * constitutes a special tribunal under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the

> claims of all parties to the public lands it is authorized to dispose of and to execute its judgments by conveyances to the parties entitled to them.

We do not understand that any Executive Department of the Government is so "vested with judicial power." Such power resides in the courts of the country, and in them alone. It is true that power and duty are laid upon the Land Department to ascertain frequently certain *facts*, upon the existence of which may depend the exercise of their executive functions, but it would be a strange confounding and perversion of governmental powers to hold that the Land Department "*is vested with judicial power to hear and determine the claims* of all parties to the public lands it is authorized to dispose of." Mr. Justice Brewer, in *Burfenning* v. *Chicago, St. Paul, etc., R. R. Co.* (163 U. S., 323), defines with his accustomed perspicuity the true limits of the "judicial power" vested in the Land Department:

> It has undoubtedly been affirmed over and over again that in the administration of the public-land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact, not resting on record, dependent on oral testimony, and it can not be doubted that the decision of the Land Department one way or the other in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined.

Here there were no matters of fact to be ascertained by the Land Department which were not matters of public record. The land to be certified to the State of Minnesota embraced all the land described in the act of 3d of March, 1857, except such as since the passage of that act had been otherwise disposed of by the United States. And in the term "disposed of" is embraced all to which homestead and preemption rights had attached. As to all such portions of said land the Land Department is without jurisdiction to dispose of, as it is of lands which had long before passed from the Government by patent or grant.

But the opinion of the lower court suggests, with great earnestness, a distinction which it insists is illustrated by many decisions of this court, which it cites. (Rec., 400.) It is between that class of cases in which the Land Department was not vested with power to hear and determine the claims of parties to land in controversy, because title to the land had passed out of the Government by patent or certification, or the land was reserved from sale or disposition by the Land Department until the determination of certain questions which were pending before some other tribunal, or in which the land had been set apart as a military or other like reservation, and another class of cases in which it is insisted jurisdiction is vested in the Land Department to hear and determine the claims of applicants for lands of the United States under homestead or preemption laws—under grants for railroads or other corporations—or by sale, or in any other recognized mode. In the latter class of cases it is insisted "that the patent or certificate issued

from the Department conveyed the legal title and was not subject to collateral attack." But this view appears to be met and completely overthrown by the opinion of Justice Brewer in the *Burfenning Case* (*supra*), where he says:

> But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title and may be challenged in an action at law.

But the learned judge, in the opinion of the court of appeals, found (Rec., 403):

> The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the Land Department to hear and determine the ultimate question, whether or not the railroad company was entitled to these lands under its grants, and to "indicate" the lands granted by certificates or patents to the State. * * * In deciding this question they necessarily considered * * * the time of the definite location of the line of the railroad, the homestead entries and preemption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally, the legal effect of all these and all other material facts, upon the claim of the railroad company to receive the lands under the acts of Congress.

THE WINONA AND ST. PETER RAILWAY COMPANY AND THE GRANTEES OF THESE LANDS UNDER CONVEYANCES FROM THAT COMPANY ARE NOT IN THE POSITION OF BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE.

By *Act approved March 2, 1896* (Stats. 1895–96, p. 42), entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes," provision is made for the protection of bona fide purchasers and the establishment of their rights after investigation of their claims.

This act does not create any new class of bona fide purchasers, nor does it furnish any new definition or prescribe any new features or characteristics of such class.

A bona fide purchaser is one who has, in good faith, and for a valuable consideration, purchased land without notice of existing adverse equities or rights. Such a purchaser must claim under a conveyance of the legal title, and he must have fully paid his purchase money.

The legal title to these lands was in the United States. It did not pass to the entrymen under homestead or preemption claims.

It is insisted here, and was so decided in the lower court, that it passed to the State of Minnesota and thence to the railroad company and those claiming under it, by the certification of these lands for railroad purposes to Minnesota.

But such legal title could only have passed from the United States by the proper act of some officer or agent duly empowered and authorized to convey it. We have endeavored to show that no such power or authority resided in the Secretary of the Interior or the officers of the Land Department.

The act of March 3, 1857, making a grant of lands

to the Territory of Minnesota, contained this important qualification of the grant:

> But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of preemption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory, or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which rights of preemption have attached.

Now, it did appear by entries of record in the Land Department that before the lines or routes of said roads were definitely fixed the United States had permitted homestead and preemption rights to attach to such lands, and they thereby ceased to be within the power of disposition by the Government.

It was not the case of the defective execution of a power by the Secretary of the Interior in certifying the lands, but of a total want of power in him to make such certification.

In *United States* v. *California, etc., Land Company* (148 U. S., 43), where the question arose under the act of July 2, 1864, granting lands to the State of Oregon to aid in the construction of a military railroad, which act provided that certain sections of the land might be sold "when the governor of said State shall certify to the Secretary of the Interior that any 10 continuous miles of

said road are completed" and the governor did so certify, Mr. Justice Brewer, delivering the opinion (p. 43), said:

> Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of *United States* v. *Arredondo* (6 Pet., 729), this court said: "It is the universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter." * * * The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party.

Here the question is as to "power in the officer."

Here no question of fact was left to the adjudication and determination of the Secretary of the Interior.

Here the records of the Land Office were open to all and every person who contemplated the purchase of said land. The slightest examination of these records would have shown that rights in said land had attached under the homestead and preemption entries.

He is not a purchaser without notice who neglects those means of notice which the law provides for all.

So, too, such purchaser from or under the railroad company must have looked to the records to ascertain what rights and interests the railroad company had acquired in these lands which it proposed to convey to him; and such examination must have disclosed to him that that company had acquired no rights or interests whatever—that such rights and interests could not accrue to it until its line of railway had been definitely located

and the map of such definite location had been filed in the office of the Secretary of the Interior. No such map had ever been filed when the alleged rights and interests of these purchasers accrued.

In the opinion of the court of appeals (Rec., 405), referring to the assignment of errors, that the appellees here are not in fact *bona fide* purchasers at all, it is said:

> This presents a question of fact which the circuit court has decided against the appellant after a full consideration of the evidence. The finding of that court is presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, it should be permitted to stand.

We can not agree in the view here stated, that the determination of the question whether one is or is not a "*bona fide* purchaser" is such an ascertainment of a fact by a lower court as is conclusive upon the appellate court. It is necessarily a mixed question of law and fact, which is open to review.

The integral facts of notice, valuable consideration, and good faith may, perhaps, be regarded as conclusive when found. But surely one can not be held to be a bona fine purchaser in legal contemplation whose *purchase* was from another who was altogether without title or interest or power to sell and convey.

If the Secretary of the Interior was without lawful power and jurisdiction to certify to the State of Minnesota, under the act of 1857, lands which since the passage of that act the Government had disposed of to other persons, then neither the State of Minnesota nor those

claiming through or under her can be held to be *bona fide purchasers* in any legal sense.

It is very earnestly insisted, however, that such injurious consequences should not be allowed to fall upon those who, in good faith, have been induced to pay their money for land which the Secretary of the Interior had, under an erroneous view of his power and duty, attempted to convey. That the citizen has the right and should be justified in relying upon the validity of the official acts of the head of one of the great departments of the Government. That if loss ensues from the ignorance, incompetence, or criminal conduct of the head of a department, such loss should be assumed and borne by the Government, who had placed such officer in the position where he was enabled to cause such loss. But these views have been very effectually disposed of by the same learned judge, who delivered the opinion in the case now under review.

In *United States* v. *Winona and St. Peter R. R. Co. et al.* (67 F. R., 969) the case arose between the same parties and presented identically the questions which are before the court in the present case. The facts, however, while alike in all other respects, differed in this: That the subsequent purchaser was there held to be affected with notice, and so the prayer of the bill for the restitution of the lands to the United States was granted. But on the point of hardship to the purchaser, Judge Sanborn said:

> There was no intended deception in the conduct or certification of the Government or of any of its officers in this case. They acted in the utmost good

> faith, and their delay was the result of their honest belief that the land had been properly certified. The negligence of the officers of the Government, however gross, could not raise an estoppel against it. Negligence is but another name for laches. Public policy demands that public interests shall not be prejudiced or jeopardized by the carelessness of Governmental officials.

While one who is a purchaser for value without notice may protect himself by showing that his purchase was made in ignorance of facts the knowledge of which was not attainable by him, he can not protect himself by pleading and proving his ignorance of the law which governs the transaction. He may in good faith believe that the vendor or the grantor has power to sell or convey, but unless such power did actually exist his belief in its existence will not protect him.

Doubtless the governor of Minnesota, and all who claim these lands under the certification of them to that State by the Secretary of the Interior, did believe in good faith that that officer was acting within the scope of his power and authority. The rules which have been prescribed in his Department for the conduct of the officers of the Land Department warranted such a belief.

Those rules were founded upon a construction of the law which this court in the *Dunmeyer Case* has held to be altogether erroneous. They proceeded upon the notion that a right to the land accrued and a title vested when the lines of definite location had been established by a *survey;* in which case the certification by the Secretary of the Interior to the governor of Minnesota would have been valid and operative.

But in the *Dunmeyer Case* (113 U. S., 634) this court said:

> * * * The act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office.

And in *Burr* v. *Greeley* (10 U. S. Ap., 409), where this very question was passed upon, the court said:

> After the decision in the *Dunmeyer Case* (113 U. S., 629) it was plain that as to all lands to which the right of preemption or homestead had attached prior to the definite location of the line of railroad the patents issued by the Government to the railroad company were void (citing cases). It was equally plain that the purchasers from the railroad company of such lands acquired no title.

The Land Department of the Government has had frequent occasion to construe and apply the adjustment act of 1887, and in their published decisions it is held that the act was intended by Congress to correct and avert the consequences of previous mistakes in the Land Department; to reinstate in certain cases the rights of those who, by reason of such mistakes, were deprived of privileges under the homestead or preemption laws; to protect persons who in good faith had purchased from or under the railroad companies; and in general to confirm and establish titles rather than to destroy or overturn them. And in its operation the court shall be resorted to only for the purpose of restoring to the Government the title to such lands as may have been certified or pat-

ented without authority of law and which the company refuses voluntarily to return.

Kearce v. *Little et al.*, 14 L. D., 25;
Drake et al. v. *Button*, 14 L. D., 18;
N. P. Ry. Co. v. *McKinley*, 14 L. D., 237;
Stebbins v. *Croke*, 14 L. D., 498;
Fletcher et al. v. *Brerton*, 14 L. D., 554;
St. P., M. & M. Ry. Co., etc., 13 L. D., 353;
St. Louis, Iron M. & Southern R. R. Co., 13 L. D., 559;
Cloessner v. *U. S. & P. R. R. Co.*, 12 L. D., 280;
Instructions, 11 L. D., 229;
Central Pacif. R. R. Co., 11 L. D., 588;
Wright & Coble, 9 L. D., 199;
Fairchild v. *Des Moines Val. R. R. Co.*, 9 L. D., 637;
In the matter of the Winona & St. Peter R. R. Co., 9 L. D., 649.

An examination of the act of March 2, 1896, discloses no ground for the suggestion that Congress intended, by the term bona fide purchasers, any other or different class than those who were purchasers for value without notice. Purchasers who had been fully paid their purchase money had acquired the legal title without notice of outstanding equities.

In the first section of the act a period is fixed within which suits by the United States to annul patents shall be brought; "but no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

The second section provides for the protection of "any person claiming to be a bona fide purchaser of any lands erroneously patented or certified;" that "an adverse

decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights," but that "if found by the court to be a bona fide purchaser the court shall decree a confirmation of the title," and that one who has not submitted his claim to the Secretary of the Interior "may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter."

By section 3 it is provided that if before any suit is brought by the United States to vacate or annul a patent or certification of lands any person or corporation claiming to be a bona fide purchaser may present a claim to the Secretary of the Interior; "and if it shall appear that such person or corporation is a bona fide purchaser, then no such suit shall be instituted, and the title of such claimant shall stand confirmed."

It will be seen, then, that throughout this act the term *bona fide purchaser* is employed in a connection which imports only the usual and ordinary significance which courts and text writers have attached to the term.

One can not be a purchaser from another who is without power to sell or convey.

The power of the Secretary of the Interior to convey by certification lands embraced in the railroad grant to the Territory of Minnesota was limited to such portions of those grants as preemption rights had not attached to at the date of the certification.

In *Weeks* v. *Bridgman* (159 U. S., 545), Mr. Chief Justice Fuller, speaking for the court, said:

> But under the granting act lands to which preemption rights had attached when the line was

definitely fixed were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for preemption rejected by the local land office and pending on appeal in the Land Department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant and the determination of the final destination would rest with the Government and the claimant.

CASE NO. 322.

The facts of this case fully appear in an "Agreed Statement of Facts" (pp. 15–18), and need not be here repeated.

In the opinion of the circuit court of appeals it is said (Rec., 90):

> The decree below must be affirmed with costs, because the appellee, Mohler, was at the time of the commencement of this action the holder of the legal title to this land and he was a *bona fide* purchaser of it for value without notice of any defects in his title. The reasons for this conclusion are stated in No. 464, *United States* v. *The Winona and St. Peter R. R. Co., The Winona and St. Peter Land Co., The Minnesota Land and Improvement Co., et al.*

And these reasons we have already considered.

HOLMES CONRAD,
Solicitor-General.

O

> definitely fixed were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for preemption rejected by the local land office and pending on appeal in the Land Department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant and the determination of the final destination would rest with the Government and the claimant.

CASE No. 322.

The facts of this case fully appear in an "Agreed Statement of Facts" (pp. 15–18), and need not be here repeated.

In the opinion of the circuit court of appeals it is said (Rec., 90):

> The decree below must be affirmed with costs, because the appellee, Mohler, was at the time of the commencement of this action the holder of the legal title to this land and he was a *bona fide* purchaser of it for value without notice of any defects in his title. The reasons for this conclusion are stated in No. 464, *United States* v. *The Winona and St. Peter R. R. Co., The Winona and St. Peter Land Co., The Minnesota Land and Improvement Co., et al.*

And these reasons we have already considered.

HOLMES CONRAD,
Solicitor-General.

165-463

165-463

SUP. CT. U. S.
FILED
NOV 20 1896
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE WINONA AND ST. PETER RAILROAD COMPANY et al. } No. 321.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN REPLY.



In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE WINONA AND ST. PETER RAILROAD COMPANY et al. } No. 321.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN REPLY.

Since the brief for the United States was filed in this case the briefs for the appellees have been received, and the points taken therein call for further consideration on behalf of the United States.

In the brief of Mr. Thomas Wilson it is insisted (p. 13) that—

I.

Admitting that a homestead entry or preemption filing on a tract of land within the place limits of a railroad grant, when the line is definitely fixed, excepts that tract

from the grant, and that the line is not definitely fixed until the map of definite location is filed with the Secretary of the Interior, yet that this rule should not be applied in this case so as to divest rights which had existed under the preexisting rule.

What is meant by this proposition seems to be that the rule announced by this court in *Kansas Pacific Railway Company* v. *Dunmeyer* (113 U. S., 629) should not be applied in the only class of cases to which it is applicable, and that the act of Congress of March 3, 1887 (24 Stat., 556), under which this suit was brought, should not be enforced because it would work a great hardship upon those persons who have purchased these lands from the Winona and St. Peter Railway Company.

While it is true that all such persons may be driven to seek their indemnity through the covenants of warranty contained in their deeds, as was Dunmeyer in the case above cited, yet that burden is certainly not near so grievous as that of the seventy-five settlers and occupants of these lands who have petitioned here for a redress of their grievances (Rec., 341) on the ground that—

> All of us have improvements on the lands claimed by us, respectively, and many of us have resided on our claims for nearly a quarter of a century and will be deprived of our homes unless you take action in our behalf and afford us an opportunity to assert our rights in the courts of the United States.

By the "agreed statement of facts" in this case (Rec., 43–44) it is ascertained that the Transit Railroad Company filed its map of definite location to the west line of range 31 on the 29th day of July, 1858; that the

Winona and St. Peter Railroad Company filed its map from the west line of range 31 to the west line of range 37 on August 3, 1864, and from the west line of range 37 to the west line of range 38 on 23d of February, 1867. That the St. Paul and Sioux City Railroad filed its map not earlier than August 10, 1865.

It is further agreed—

> That it appears from the records and files of the General Land Office that homestead entries or preemption filings, prima facie regular, and valid, were made upon all the several tracts of land in the bill of complaint described by the persons and at the place and times therein set forth. That such proceedings were had thereon that the proper officer, before said lands were certified to the State aforesaid, canceled all such entries or filings at the time, in the manner, and for the reasons set forth in the schedule hereto attached, marked Exhibit IX.

It further appears from Exhibit IX (Rec., 55) that none of the lands embraced in the map of definite location of the transit railroad company, being lands east of the west line of range 31, are involved in this proceeding; but to all of the lands involved here homestead and preemption entries attached prior to the dates when the maps of definite location of the other railroad companies named were filed in the office of the Secretary of the Interior.

The contention here is that prior to the decision by this court in the case of *Kansas Pacific Railroad Company* v. *Dunmeyer* a different rule prevailed in the General Land Office, under which titles to land under railroad grants had vested, and that that had become a "rule of

property" under which purchasers from these railroad companies had acted and by which it is insisted they should be now protected.

A very brief review of the legislative and departmental proceeding as to the railroad grants to the State of Minnesota may serve to dispel the notion that any legal or equitable right vested in these purchasers, of the violation of which they may now justly complain.

The act of 3d of March, 1857 (11 Stat. 195), expressly provides—

> * * * But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of preemption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory, or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of preemption have attached as aforesaid, which lands * * * shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid.

Here then, in the original grant, was a clear and explicit warning to the railroad company and to all purchasers therefrom that such grant did not include any portion of the land embraced therein to which homestead and preemption rights had attached.

The records of the local and General Land offices were open to all persons contemplating the purchase of these lands; and from these records it might have been readily ascertained what portion of these lands, if any, were covered by homestead or preemption rights.

Purchasers of these lands, like all other purchasers, were affected with notice of what the public records disclosed. But still further, and that no ground of excuse may remain for the alleged ignorance of such purchasers as to what constituted a "definite location," it appears (Rec., 149) that on July 21, 1857, Thomas A. Hendricks, Commissioner of the General Land Office, in an official communication to the governor of Minnesota on the subject of this grant, said:

> The first thing to be done is to transmit to this and the proper local offices separate connected maps of the several roads certified as the lines of route as "definitely fixed" by the respective companies under their seals, the dates of location to be verified by the affidavits of the engineers, and certified likewise by the governor under the seal of the Territory. * * * As the title of the Territory will vest in the alternate sections within 6 miles of the roads from the dates when the lines of route are "definitely fixed," and also that of the right of way, under the general law of the 4th of August, 1852, *from the date of the filing the maps of the same in this office,* the importance of an early compliance with these requirements, as well as accuracy in showing the tracts cut by the routes, will be seen and appreciated.

The grant was to the Territory or State of Minnesota, and here was a distinct official notification from the Commissioner of the General Land Office to the governor of

Minnesota that the title of the Territory to the granted land vested only when the line of the railroad was "definitely fixed," and that the line would not be "definitely fixed" until the map of definite location was filed in the office of the Secretary of the Interior.

At the date of this communication the title to this land had not passed from the United States to the State of Minnesota, or to the railroad companies, or to their grantees. The Supreme Court, in the Dunmeyer Case, did not prescribe or establish the rule that definite location meant the filing of the map in the Interior Department. That rule, we now see, existed as far back as July 21, 1857 and was known to and enforced by the officers of the General Land Office.

But suppose it were true that a wholly different construction had been erroneously placed upon the statute by the officers of the General Land Office prior to the decision of the Dunmeyer Case and had been followed for a long time in certifying lands under railroad grants, could such erroneous construction of the law operate to pass title from the United States?

It is said that the language employed by this court in *United States* v. *Burlington Railroad Company* (98 U. S., 341) sanctions this view. (Wilson's brief, p. 15.)

We do not so understand the opinion. That was a bill in equity brought by the United States to annul certain patents issued by them to the defendant company. Various grounds were stated in the bill for the relief prayed. One was that the grant of land was to aid in the construction of each section taken separately; another, that the

grant was only of land situated within 20 miles of the road; and still another, that the act of July 2, 1864, amending the act of July 1, 1862, was intended to apply to the Union Pacific Company alone, and not to the branch companies. It was in meeting this last point that Mr. Justice Field used the language quoted in Mr. Wilson's brief. He said:

> All the reasons which led to the enlargement of the original grant led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory act, to place the Union Pacific Company and all its branch companies upon the same footing as to land, privileges, and duties, to the extent of their respective roads, except when it was otherwise specially stated. Such has been the uniform construction given to the acts by all departments of the Government, etc.

He argues that the construction of the Union Pacific act contended for in the bill was at war with the construction which that act had always received from Congress, the Executive Departments, and the company itself; that patents, bonds, and mortgages had been issued under it, and that "this uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision." In that case judicial decision was in accord with the uniform construction of the parties in interest, while here what is claimed to have been the uniform construction of "definite location" is by judicial decision ascertained to be erroneous in the first case in which that question is presented to the court.

It is certainly true that the contemporaneous construction of a statute, by those charged with its execution, is entitled to great respect and should not be disregarded unless it is clear that such construction is erroneous. (*United States* v. *Johnston*, 124 U. S., 253; *Heath* v. *Wallace*, 138 U. S., 582; *Pennoyer* v. *McConnaughy*, 140 U. S., 23.) But—

> It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material. (*United States* v. *Tanner*, 147 U. S., 663.)

And in *United States* v. *Union Pacific Railway* (148 U. S., 572) this court, speaking through Mr. Justice Brown, said:

> If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the Land Department for eighteen years, under which construction these lands had been put upon the market and sold, would undoubtedly be entitled to considerable weight.

And in *United States* v. *Alger* (152 U. S., 397) this court, through Mr. Justice Gray, said, with reference to another act of Congress:

> If the meaning of that act were doubtful its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute as applied to these cases appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect.

So, we conclude, the intent, purpose, and effect of a statute, as ascertained and adjudged by this court, can not

be set at naught and disallowed because the officers of one of the Executive Departments of the Government may, through ignorance or pride of opinion, have sometime given to it a different construction.

The officers of the Interior Department were in error in the construction held and applied by them, but it can not be successfully maintained that their error should be adopted by the courts and perpetuated in their decisions. (*Sioux City, etc., Land Co.* v. *Griffey*, 143 U. S., 37–39; *United States* v. *Northern Pac. R. R. Co.*, 148 U. S., 572; *United States* v. *The Dalles Mil. Co.*, 140 U. S., 631; *St. Paul, etc., Ry. Co.* v. *Phelps*, 137 U. S., 536.)

It should be borne in mind that in passing the act of March 3, 1887, Congress, in considering the mischiefs to be remedied thereby, must have reviewed the course of previous legislation and of departmental practice with reference to the disposition of the public lands, and must have observed the widely divergent views of the Land Department and of the Supreme Court of the United States, and for that reason had in the first section of the act directed that the adjustment of the land grants should be made "in accordance with the decisions of the Supreme Court."

The Supreme Court had, at the time of the passage of this act, held that the title did not pass under a railroad grant until the map of definite location of the road had been filed in the office of the Secretary of the Interior, the Interior Department having before that time held that the title passed when the line of definite location was staked out on the face of the earth.

The Supreme Court have held that lands excepted from the grant at the time it attached, but which afterwards reverted to the United States, did not inure to the grant, while the Interior Department has held that when such lands reverted to the United States they passed under the grant to the railroad companies.

All these contrarieties of view were known to Congress, and in large measure induced the passage of the act.

Again, it is insisted (Wilson's brief, 20) that—

II.

> *If upon any state of facts a conveyance or patent might have been lawfully issued, the court will presume, as against such attack as this, that the facts justifying it existed; and to overcome that presumption the evidence must be clear and conclusive.*

There can be no doubt of the fact—and no formidable display of authority is needed to sustain it—that deeds and patents, prima facie valid, are presumed to be so until the contrary is clearly shown; and all incipient or preliminary facts which the grantor was empowered to ascertain will be presumed to have been established until the contrary is shown in a proceeding to impeach the conveyances for fraud or mistake.

But we are not dealing here with any controverted questions as to the weight of evidence. The case is here upon an "agreed statement of facts," and no question of fraud or mistake of fact is anywhere suggested in the record.

No room for resort to presumptions is afforded by any deficiency or weakness of proof. The facts here are crystallized by the agreed statement.

If homestead and preemption claims attached to this land at a date prior in time to the filing of the map of definite location of the railroad company in the office of the Secretary of the Interior, then those claims are prior in right, and, under the law as this court has declared it, the railroad companies must be required to respect those rights and to disgorge the lands to which those rights had attached.

In the *Dunmeyer Case* (113 U. S., 641) this court said:

> The reasonable purpose of the Government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preemption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute.

And again, it is insisted—

III.

> *The certified lists of these lands by the Secretary of the Interior to the State conveyed as complete a title as a patent.*

That is true where the lands certified were within the jurisdiction of the Secretary of the Interior and he was invested with power to certify them. But if, as appears here, the lands certified by him to the State of Minnesota had been previously sold or otherwise disposed of by the United States, if homestead or preemption claims had attached thereto, then such lands were not within

his jurisdiction and he was without power to certify or grant them. The act of 1857, by which this grant was made, expressly excepts from its operation any portion of the land which had been previously disposed of, or to which homestead or preemption claims had attached; and it provides indemnity to the railroad company for so much of the lands as by these means had been deducted from it.

By *Act of July 13, 1866* (14 St., 97, sec. 3), it was provided—

> That all the lands heretofore granted to the Territory and State of Minnesota to aid in the construction of railroads shall be certified to said State by the Secretary of the Interior from time to time, *whenever any of said roads shall be definitely located*, and shall be disposed of by said State in the manner and upon the conditions provided in the particular act granting the same, as modified by the provisions of this act.

So the power of the Secretary of the Interior to certify the lands vested and could be exercised only when the line of the railroad was definitely located.

The contention that the certification of these lands by the Secretary of the Interior vested the legal title thereto in the State for the benefit of the railroad company can not be maintained. If it is held that the legal title could vest by certification of the lands under the provisions of the granting acts, it certainly can not be claimed that as to the lands which were not included within the grants such certification could have that effect or could convey any right or title whatever. (*Sampeyreac* v. *United States*, 7 Pet., 241; *Williamson* v. *Ball*, 8 How., 568;

Gaines v. *New Orleans*, 6 Wall., 642; *Moffat* v. *United States*, 112 U. S., 24; *Kansas Pac. Ry.* v. *Dunmeyer*, 113 U. S., 641–644; *Smelting Co.* v. *Kemp*, 104 U. S., 646; *Steele* v. *Smelting Co.*, 106 U. S., 452; *Bert* v. *Polk*, 18 Wall., 117.)

Indeed, the courts have informally held, wherever the question has arisen, that the certification or patenting of public lands for which there was no authority in the granting act never operates in itself to defeat the right of the grantor to reassert title.

Section 2449, Revised Statutes, provides:

> Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office under the seal of his office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists *that are of the character contemplated by such act of Congress, and intended to be granted thereby;* but where lands embraced in such lists are not of the character embraced by such acts of Congress and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby. (*Fraser* v. *O'Connor*, 115 U. S., 102; *McCreery* v. *Haskell*, 119 U. S., 331.)

Under the act of 1857, then, the Secretary of the Interior had power to certify to the State of Minnesota only the land contemplated by the granting act and

intended to be granted thereby. As to all lands not of this character, the certification was "perfectly null and void, and no right, title, claim, or interest," passed thereby.

And again, it is insisted (Wilson's brief, 28) that—

IV.

The complainants have failed to prove that according to any construction of the statute these lands were excepted from the grant to the defendant railroad company.

The proof is furnished by the act of 1857, by which the grant to the railroad company was created. That act excepts from the grant so much of the land as the United States have granted, or to which the right of preemption has attached, by the provision authorizing the governor of Minnesota, subject to the approval of the Secretary of the Interior, to select from the lands of the United States—

> Nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of preemption have attached, as aforesaid, which lands * * * shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid.

This has been expressly recognized and adjudicated in *United States* v. *Winona and St. Peter Railroad Co.* (67 Fed. Rep., 969) by the same learned judge who rendered the decree from which this appeal was taken. In that case he sustained the claim of the preemption holder

on the ground that his possession of the land, claimed under his preemption filing, "was notice to Barney and his associates and to the land company of his claims to the land as a preemptor and of the fatal defect in their title, to which these claims so clearly pointed."

Had not that portion of the land to which preemption claims had attached been excepted from the grant to the railroad company, then would the preemptor have had no such rights as could prevail against the claim of the railroad company and of which his possession affected that company with notice.

In the Union Pacific grants, under the acts of 1862 and 1864, the language is somewhat different. It was a grant of the land designated—

> Not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed. (12 Stat., 492.)

But whether the intent of Congress be expressed in direct or indirect terms, if it is plainly and unequivocally manifested, the effect is the same.

Here, in the grant to Minnesota, the exception was not directly expressed, but was with equal clearness manifested by the provision which appropriated to the State, or to the railroad company for whose benefit the grant was made, an equivalent in other lands of the United States, for so much of the land granted as appeared at the time of filing the map of definite location to have been sold or otherwise disposed of by the United States, or to which preemption rights would attach.

It is true that by the letter of Commissioner Hendricks to the governor of Minnesota, of July 21, 1857 (Rec., 149), already referred to, it is stated that the lands embraced in the act of 1857, "within the probable limits of selection, were directed to be withdrawn from sale and location by telegraphic dispatches of the 7th March and 9th April, 1857."

But it does not appear anywhere in this record that those instructions of the Commissioner had ever been acted upon by the person to whom they were given, or that the lands had ever been in fact withdrawn. And the fact that it does appear that certificates of preemption upon those lands had been subsequently issued by the local office (Rec., 55–72) repels the conclusion that the lands or any part of them had been withdrawn from sale and location.

But it does distinctly appear (Rec., 51–52) that on April 15, 1864, the register of the land office at St. Peter, Minn., sent to the Commissioner of the General Land Office a plat of the railroad survey filed in his office April 12, 1864, and asked, "Will homestead claims made prior to the 12th instant be allowed to enter under said act?" to which Edmunds, Commissioner of the General Land Office, replied, by letter of April 28, 1864, acknowledging receipt of map and returning the same, that—

> The governor's certificate may be attached thereto and that the several dates may be added to the map of the line of the road as surveyed on the ground from point to point. It is necessary that the map of survey should be transmitted to the Department by

> the governor of the State. On *its being received through him, and accepted by the Department, you will be directed to withhold the odd sections from sale and preemption, etc.*

And, again (Rec., pp. 52–53), the Commissioner of the General Land Office, by letter of August 10, 1864, to the register and receiver at St. Peter, Minn., said:

> * * * That is, from the date of the reception of this letter the odd sections within the limits are withdrawn from sale, preemption, or homestead entry. * * * The rights of preemptors are governed by the date of actual survey or laying down of the line of the road as designated on the map.

Indeed, it appears (Rec., p. 145) by a letter from Thompson, president Minnesota Valley Railroad Company, to the governor of Minnesota, of June 21, 1864, that the writer then suggested to the governor that he "request the Commissioner to withdraw temporarily from sale or preemption lands along the whole line of the road, and so notify the local land officers with the least possible delay."

It appears from the answer of the Winona and St. Peter Railroad Company, appellee here (Rec., 19), that the Minnesota Valley Railroad Company, was the same as the St. Paul and Sioux City Railroad Company, and was a "beneficiary of the grant by the said act of Congress of March 3, 1857, so far as it related to that line of road." Nowhere in that answer is it pretended or claimed that the lands embraced in the grant under the act of 1857 were withdrawn from sale or preemption;

but, on the contrary, it is expressly admitted (Rec., 20), that the rights of preemption had attached but had been subsequently canceled.

It is true (Rec., 25) that the answer disclaims any knowledge as to—

> Whether or at what time any of such pretended filings or entries were made, and it avers that when its line of road was definitely located and fixed opposite and past said lands the United States had not sold or otherwise appropriated or disposed of, nor had the right of preemption attached to any tract or parcel thereof, nor was any tract or parcel thereof thus or otherwise excepted from the operation of the defendant's said grant, or erroneously certified to the State.

And in the opinion of the circuit court of appeals (Rec., 394) it is said:

> The existence of the homestead entries and preemption filings when the line of the railroad was definitely fixed *was conceded by the appellees*, and their defense was that the certification of the lands to the State, although erroneous, was not void, but conveyed the legal title.

In the opinion of Judge Dillon, in the case of *Barney et al.* v. *The Winona and St. Peter Railroad Company*, introduced in this case by the appellees (Rec., 171), he said:

> I am of opinion that under the act of March 3, 1857, Congress did not intend to grant lands which before the date of the act it had sold, and that indemnity is confined to lands within the grant sold or disposed of by the United States after the date of the grant and before the definite location of the road.

And in the same case (Rec., 178) Judge Samuel F. Miller delivered the opinion of the circuit court, in which he said:

> I am of opinion that by the true construction of the act of Congress of 1857 granting lands to the Territory of Minnesota the indemnity clause was intended to include alternate sections within the prescribed limit which had been sold by the United States or lost by preemption prior to the date of the grant, as well as such as might be sold between that time and the location of the road. And without further comment on the case of the *L. L. and G. R. R. Co.* v. *United States* (92 U. S., 733) and the *Burlington and Missouri River R. R. Co.* v. *United States* (98 U. S., 339), I do not believe the court in these cases intended to establish a different doctrine. (See *Winona and St. Peter R. R.* v. *Barney*, 113 U. S., 618.)

But the learned counsel taxes our forbearance when he seeks, as he does (p. 19 *et seq.*), to repudiate his solemn stipulation, by which the facts of this case were agreed between counsel. (Rec., 42–49.) It was obviously the purpose of that stipulation, as in every agreed statement of facts, to facilitate the consideration of the cause by agreeing to the facts which the evidence adduced plainly establishes.

Thus, instead of encumbering the record with voluminous documentary evidence and the depositions of witnesses set out in full, counsel, with honorable intent and in good faith, agree upon a statement which they adopt, as expressing the legal effect and purpose of the documents and the substance and effect of the parol testimony.

To that end and with that intent, doubtless, did the counsel whose names appear signed to this stipulation (Rec., 49) enter into it; and yet the learned author of Wilson's brief (p. 29 *et seq.*), referring to Exhibit IX (Rec., 55), entitled "Schedule of entries and filings upon the lands involved; proceedings relating thereto, with synopsis of testimony in each case and final disposition," insists, in support of this point, that—

> They (United States) also failed to show the alleged preemption entries and homestead filings which it is contended excepted these lands from the railroad grant. The only evidence which they offered to establish these facts is the stipulation—
>
> "That it appears from the records and files of the General Land Office that homestead entries or preemption filings, prima facie regular and valid, were made upon all the several tracts of land in the bill of complaint described by the persons and at the place and times therein set forth. That such proceedings were had thereon that the proper officer, before said lands were certified to the State aforesaid, canceled all such entries or filings at the times, in the manner, and for the reasons set forth in the schedule hereto attached, marked Exhibit IX (Rec., 55), and made part hereof; which schedule further shows all subsequent attempted entries of said lands or filings thereon, and the disposition of such attempted entries or filings."
>
> We contend that this was not competent evidence and does not prove anything. Exhibit IX, on its face, does not purport to be aught else than mere memoranda, or extracts made or taken by some clerk from some other records, papers, or files. * * * This was, therefore, mere hearsay, and even if competent, it was insufficient.

That is, that although counsel has signed a stipulation that this "schedule of entries and filings upon the lands involved," states facts necessarily obtained from public records, yet, that it shall not now be considered by this court of review, although fully recognized, considered, and passed upon by the lower court, because, forsooth, the public records themselves from which these facts were gathered are not here set out in the record.

Why not as well take the first and second of the facts agreed (Rec., 42) as to the creation of the Transit Railroad Company and the transfer of its franchises and properties to the Winona and St. Peter Railroad Company, and object to them on the ground that the charter of incorporation of the one and the deeds of conveyance of its franchises and properties to the other, are not fully set out in this record? With as much justice and propriety might this be done as the other.

As homestead or preemption rights had attached to all the lands in controversy prior to the time when the route of the Winona and St. Peter Road was definitely fixed and remained attached until after such line was definitely fixed, it is now settled that such lands were excepted from the operation of the grant, and that having been so excepted the cancellation of the entries or filings subsequent to the time when the line of the road was definitely fixed, did not operate to bring them within the grants.

K. P. Co. v. *Dunmeyer*, 113 U. S., 641.
Van Wyck v. *Knevals*, 106 U. S., 360.
H. & D. Rwy. Co. v. *Whitney*, 132 U. S., 357.

Northern Pac. R. R. Co. v. *Bardon*, 145 U. S., 535.

U. S. v. *M., K. & T. Rwy. Co.*, 141 U. S., 358.

Sioux City & I. F. Town Lot. & Land Co. v. *Griffey*, 143 U. S., 32.

U. S. v. *S. P. R. R. Co.*, 146 U. S., 570.

Again, it is insisted (Wilson's brief, 31) that:

V.

> *The evidence affirmatively shows that the line of road was definitely fixed past most of these lands and the map thereof filed with the Secretary of the Interior before the alleged filings and entries.*

The ground for this contention appears to be (Brief, 33) that in the letter of August 10, 1864, from Jas. S. Wilson, Acting Commissioner General Land Office, to the register and receiver at St. Peter, Minn., he said (Rec., 53):

> The rights of preemptors are governed by the date of actual survey or laying down of the line of the road as designated on the map.

And so Commissioner Hendricks also had said, on March 30, 1858 (Rec., 151):

> The railroad grant will attach and take the lands in place from the date of the "definite location"; and that is, when the line of route shall have been surveyed, actually staked off, and fixed on the face of the earth.

But, as we have already seen, these opinions of the officers of the Land Office as to the construction of the laws can not be regarded as rules of property which may prevail against a judicial construction of the law.

Both of these opinions have been judicially determined to be wrong. How they can be said to "evidence affirmatively" that the line of definite location of the road was fixed before the filings and entries it is not easy to discover.

It is obscure enough from the "agreed statement of facts" when the map of definite location of the Winona and St. Peter Railroad Company was filed with the Secretary of the Interior.

Section 7 of the agreed statement (Rec., 43–4) shows that the Winona and St. Peter Railroad Company fixed its line of road on the face of the earth from the west line of range 31 to the west line of range 37 on or before the 9th day of April, 1864, and on April 12, 1864, filed in the office of the register of the land office at St. Peter, Minn., a map, which the register forwarded to the Commissioner of the General Land Office on April 15, 1864, and which the Commissioner of the General Land Office returned to him on the 28th of April, 1864, with a letter, in which he said:

> The same is herewith returned that the governor's certificate may be attached thereto, and that the several dates may be added to the map of the line of the road, as surveyed on the ground from point to point. *It is necessary that the map of survey should be transmitted to the Department by the governor of the State.*

And on August 3, 1864, a map of the definite location of the line of said road was filed in the office of the Commissioner of the General Land Office. But it is stated to be a matter of doubt whether the map filed

August 3 in the General Land Office was the same map which had been previously forwarded to the Commissioner on April 15.

Certain it is, beyond all cavil or dispute, that no map of definite location was actually filed with the Secretary of the Interior prior to August 3, 1864. It is equally true, as appears by Exhibit IX (Rec., 55–72), that all the entries, homestead and preemption, with the exception possibly of Nathan Tanner's (Rec., 59), were prior to August, 1864.

It is further insisted (Wilson's brief, 35) that:

VI.

> (*a*) *So far as the lands in question, certified to the State for the Sioux City Company, are concerned, both the legal and equitable title passed to the State from the United States by such certification.*

Paragraph 11 of the agreed statement of facts (Rec., 45) is relied on to sustain this contention. It appears that the St. Paul and Sioux City Railroad Company (herein called the Sioux City Company) was one of the beneficiaries of the act of March 3, 1857, and of another act of May 12, 1864, granting lands to the State of Iowa for railroads.

It appears by letters from the Commissioner of the General Land Office (Rec., 53–4) and by statement of facts (Rec., 44) that the map of definite location of this road was filed in the office of the Secretary of the Interior not later than August 10, 1865.

It further appears (Rec., 45) that the homestead and preemption entries and filings were canceled—

> In the manner and for the reasons set forth in the schedule marked Exhibit IX (Rec., 45) * * *. And after said filings had been so canceled and set aside, and before the lands were certified to the State as aforesaid, the St. Paul and Sioux City Railroad Company selected the land so certified by the State for it as aforesaid, as inuring to it under its said grants.

That is, that after the homestead and preemption entries had been canceled, they became public lands of the United States; and being so, the Sioux City Company selected them as indemnity for the lands lost from its grant within its place limits; and that, therefore, the United States can not maintain this suit against the defendants therein.

This appears on its face to be something of a *non sequitur*.

This suit is against the Winona and St. Peter Railroad Company. The Sioux City Company is not a party to it; nor is it in privity with the defendants here to it.

The contention of this bill is that the defendant company has acquired no title to the lands embraced in the bill, because the title thereto remains in the United States and did not pass from them by any certification of such lands by the Secretary of the Interior to the State of Minnesota, under whom defendant company claims, because the Secretary of the Interior was not empowered to certify said lands.

But the argument of the defendant company is that, even admitting the Secretary of the Interior was not authorized to certify lands under the railroad grant to Minnesota until the line of railroad was definitely fixed, yet, inasmuch as the lands to which homestead and preemption entries had attached were excepted from such railroad grants, and when said homestead and preemption entries were canceled the lands covered thereby reverted to the United States and became public lands subject to disposition and sale and liable to be selected by the Sioux City Company as part of its indemnity land.

The *Act of March 12, 1864* (13 Stat., 72), granting lands in the State of Iowa, provided that to the extent that homestead and preemption rights had attached to the lands granted thereby, when the lines of the roads were definitely fixed—

> Then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land, etc.,

as would be sufficient to indemnify the company, subject to certain provisos mentioned in the act, a provision in all respects the same as that contained in the act of March 3, 1857.

It is a fact agreed in this case (par. 16, Rec., 48) that the Secretary of the Interior has not demanded from the St. Paul and Sioux City Railroad Company a relinquishment or reconveyance to the United States of any of said lands, unless the evidence in this case shows acts

equivalent to such demand, or facts excusing the making of the same.

Paragraph 10 (Rec., 45) of the agreed statement of facts recognizes Exhibit A, filed with the answer of the defendant company (Rec., 27), as containing the correct list of the lands certified by the Secretary of the Interior to the State of Minnesota, and the companies for which they were certified. It appears from this list that certain of these lands were certified by the Secretary of the Interior for the use of the Sioux City Railroad Company.

It appears by paragraph 13 (Rec., 46) that the governor of Minnesota was prevented from conveying such lands to the Sioux City Company by an injunction sued out by the Winona Company, restraining the Sioux City Company from accepting or receiving a deed from the Government conveying said land. That cause came finally to this court in *St. Paul Railroad* v. *Winona Railroad* (112 U. S., 720), where the facts are fully recited in the opinion of Justice Miller. In that case the St. Paul and Sioux City road insisted upon its right to enter the six-mile limit of the Winona and St. Peter road whenever its indemnity limit of fifteen miles and its extension limit of twenty miles overlapped the six-mile limit of the Winona road, and to the exclusion of the Winona road select there all the odd-numbered sections, to which that company would otherwise be entitled.

This court affirmed the judgment of the supreme court of Minnesota denying the claim of the Sioux City road, and upon the merits of that controversy decided in favor of the Winona Company.

The United States was not a party to that suit, nor were the questions which are raised here decided or considered there.

That case assumed that title had passed from the United States to the State of Minnesota for the use of the railroad companies. It decides nothing that can in the remotest degree relate to the issues involved here.

We are unable to appreciate the force of the argument in the brief of counsel on this point. The source of title of both companies to any of the land embraced in these railroad grants is the United States. By whatever means or through whatever channels title may be claimed to have finally reached the railroad companies, it must appear that by some valid, competent, and duly authorized conveyance it passed out of the United States; and there, as we concede it, is the real point in controversy.

We deny that the Secretary of the Interior had power or authority to pass the title to these lands by his certifications thereof to the State of Minnesota, and from that standpoint we are unable to see how the title of the Sioux City Company can be distinguished from that of the Winona Company, and how the case of the Sioux City Company can be considered in this proceeding at all for any purpose.

Indeed, these questions, so far as they relate to the Sioux City and St. Paul Railroad, have been already fully considered and determined in the cases of *Sioux City and St. Paul Railroad Co.* v. *United States* (159 U. S., 349), *Chicago, Milwaukee and St. Paul Ry.* v. *United States* (159 U. S., 372), and *Sioux City and St. Paul Railroad Co.* v. *Countryman* (*ib.*, 377).

The present suit is between the United States and the Winona Company, which holds the lands and refuses to relinquish them. Its claims must stand or fall upon the acts in its aid, and it is sufficient for this case to determine that the lands in dispute were not included in the grants in aid of the Winona road. What becomes of them after they are recovered by the United States is a matter of no concern whatever to the Winona Company. (*United States* v. *Southern Pacific R. R. Co.*, 146 U. S., 604.)

The lands were by mistake certified in aid of the Sioux City road. The legal effect of that certification was, as this court has determined, to convey them for the use and benefit of the Winona Company.

The Secretary of the Interior, under whose direction this suit was instituted, in proceeding to adjust the grants in aid of the Winona road, found these lands in the possession of the Winona Company, claimed by it under its grants, and that company can not shield itself from the operation of the adjustment act and of its own granting acts, by insisting that these lands fell, or were certified to the Sioux City road.

We submit that a proper construction of the granting acts in aid of the two roads does not sustain the position taken by the Winona Company.

The courts have uniformly construed these grants strictly against the grantee companies. They are never extended beyond the scope of their express provisions, and wherever the question as to reservations and exceptions has arisen, or there appear conflicting claims between two or more companies, great care has been exercised to

exclude from grants lands which have been reserved, appropriated, or devoted to another purpose by every reasonable construction in favor of such reservation, on the theory that it has been the evident intention and purpose of Congress, in all such grants, to limit them in their operation to such lands only as the United States had the clear and unquestioned right to convey at the time without disturbing existing relations or producing vexatious conflicts. (*Bardon* v. *Northern Pacific R. R. Co.*, 145 U. S., 543; *United States* v. *M. K., and T. Co.*, 141 U. S., 358–368–374; *Leavenworth, etc., R. R. Co.* v. *U. S.*, 92 U. S., 733; *U. S.* v. *N. P. R. R. Co.*, 152 U. S., 296.)

So it has been held, in the foregoing and many other cases, that such grants shall operate at a fixed time and shall take only such lands as are at that time public lands (that is, lands which the United States has the clear right to convey), and therefore grantable by Congress, and are never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. (*United States* v. *S. P. R. R. Co.*, 146 U. S., 570–581.)

It is also a settled rule that "it is always to be borne in mind in construing a Congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress." (*United States* v. *S. P. R. R. Co.*, *supra*, 598.)

Nor is it ever held, in the absence of express provision, that Congress, having devoted lands to one purpose,

intends by a subsequent grant to convey them conditionally for another. (*United States* v. *S. P. R. R. Co.*, 146 U. S.; *Bardon* v. *N. P. R. R. Co.*, 145 U. S.; *United States* v. *M., K. and T. R. R. Co.*, 141 U. S., and cases cited.)

Here again the intention of Congress is looked to for the purpose of arriving at a true construction of apparently conflicting grants, and the evident purpose controls. This is well illustrated in the case of *United States* v. *S. P. R. R. Co.*, where the place limits of two roads intersected, and the Southern Pacific Company claimed that the Atlantic and Pacific Company having failed to build its line, by reason of which, under the terms of its grants, the land reverted to the United States, that it (the Southern Pacific Company) became entitled to them as within its place limits under a subsequent grant.

It has also been held by the Supreme Court that—

> Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress. (*Bardon* v. *N. P. R. R. Co.*, 145 U. S., 535; *Leavenworth, etc., R. R. Co.* v. *U. S.*, 748–749.)

Now, applying these principles of construction to the acts in aid of these two roads, we do not see how the St. Paul and Sioux City can have any right to the lands in controversy if the Winona road is not entitled to them. Being excepted and reserved from the grant of 1857 in

aid of the Winona road, they were as well reserved and excepted from the grant in aid of the Sioux City road.

It has already been held, in *St. Paul Railroad* v. *Winona Railroad, supra* (no question being raised that they were reserved to the United States by the granting act), that they belonged, as between the two companies, to the Winona road—that is, that they were included in the grant in aid of the Winona road, and that no prior location of the St. Paul and Sioux City, although its grant was simultaneous with the grant of the Winona road, could divest the right of that road. Being within its place limits, they were reserved from the operation of the Sioux City grant as clearly as if that grant was subsequent in point of time. It would have been contrary to every rule of construction adopted by the Supreme Court to have held otherwise.

As the matter now stands between the Winona Company and the Sioux City Company, the title to the lands in question is in the former. This being the case, we now come particularly to the claim advanced by the appellees.

In the granting act certain reservations and exceptions were made which apply to both lines. By the grant itself no title to any specific tracts passed until the route of the road was "definitely fixed." Until that time Congress reserved the right of disposition in the United States of any of the lands within the place limits of each road. Such lands as it might dispose of were in the manner stated in the act clearly excepted from the operation of the act. Is not this true as well with reference to any

other line provided for in the act as to the line within whose place limits they might fall?

For it can not be supposed that Congress intended to give a better right to some other company to lands within the place limits of the Winona road than it gave to that road, or that the exceptions and reservations which applied to and limited the latter grant should operate in favor of the promise of indemnity to the former.

Neither can it be reasonably urged that Congress ever intended that the Sioux City might go into the place limits of the Winona road to seek indemnity from lands which did not pass to the latter road by reason of a disposition thereof by the United States prior to the definite location of the Winona road and which after that time reverted to the United States. The Winona road could not take them as indemnity. It was confined to land outside its place and within its indemnity limits, and the same policy which prompted Congress to so frame its act as to bring about this construction speaks as strongly against allowing the Sioux City road to select them.

The intention of Congress was to devote the odd-numbered sections of public lands within the place limits of each road at the time of the definite fixing of its line to the building of that particular road. Lands which were excepted were not in any manner to be applied to the benefit of either. If they were sold, and the purchaser complied with the conditions of the sale, they were to be held by such purchaser free from any claim of the railroad company. If they were segregated from the public domain

by preemption or homestead claims, and the laws were complied with, the parties filing upon them or entering them became the absolute owners, and if they failed to comply (the facts existing at the time of the definite fixing of the route of the roads which excepted them from the grants) they reverted, not to the grant, but to the United States. This is settled beyond all controversy. The act of 1857 confined each road, in selection for indemnity, to lands outside its place limits, by this section and the language creating the indemnity promise. Can it then be successfully urged that if one road could not select lands within its place limits as lieu lands, then it could go into the place limits of the other for such lands?

Further, as indicating the intent of Congress that one road should not obtain any right under the act to lands within the granted limits of another, the fourth section provides for disposition of the lands granted as the road for which they are granted is completed, and that if any of the roads are not completed within ten years the lands unsold (granted to that road) shall revert to the United States. This provision created a condition subsequent, upon failure of which the United States might, after declaring a forfeiture, retake the lands. This result is wholly inconsistent with the claim that lands within the granted limits of the one company can be taken as indemnity by the other. Such a forfeiture, if declared, would not have been for the benefit of the Sioux City road. (*U. S.* v. *S. P. R. R. Co., supra; U. S.* v. *N. P. R. R. Co.*, 14 Sup. Ct. Rep., 603–4.)

And providing for it shows that Congress never had in view the claim that is now urged by counsel for the appellees.

It is clearer still that the St. Paul and Sioux City Company was not entitled to the lands shown in the record to be within its ten and twenty mile limits under the act of 1864 and the act of March 3, 1865, amending the granting act of March 3, 1857. This act of 1865 was passed while the homestead and preemption rights excepting the lands from the grant to the Winona road were uncanceled and before the line of this road west of range 37 had been definitely fixed, and some of the lands in controversy lie west of that range.

The act of 1864 was passed before the line of the Winona road opposite any of the lands in controversy was definitely fixed. The amendatory act of 1865 and the additional grant of 1864 each contained provisions *reserving and excepting from their operation* "any and all lands heretofore reserved to the United States by any act of Congress in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatsoever."

It certainly can not be held, in view of this language and the strict rules of construction so well established, that lands situated, as were the lands in controversy at the date of these acts, were intended by Congress to be subject to them. By the place grant of the Winona road they were devoted to the purpose of its construction until its line was definitely fixed. In other words, they were *reserved* to this purpose, this reservation being only

liable to be defeated by disposition sooner under the public-land laws. And by the operation of these laws through the attaching of homestead and preemption rights before the line was definitely fixed they were "reserved" from the operation of the subsequent acts. Not alone from the operation of the *grant* in these acts of lands within place limits, but from the *entire acts*.

And—

> (*b*) *Every tract of land involved in this suit, except those certified to the Sioux City Company, and with the exception of a few acres those certified to that company also, are held and owned by bona fide purchasers for value from the railroad company or its grantees, and their title is unimpeachable.*

To be *bona fide purchasers*, they must, in good faith, and for valuable consideration, have acquired the legal title without notice of outstanding superior equities. Unless they can bring themselves within these terms, their pretensions to the character of such purchasers are vain.

If, as we have contended, title has never passed from the United States—if the "certification" by the Secretary of the Interior was void for want of power in him to make it, then, on the threshold, it would seem that these purchasers could not be invested with the legal title.

As suggested in our former brief, we discover nothing in the legislation of Congress intended to alter the characteristics and definition of a *bona fide purchaser* as these have been ascertained and established by the courts from the earliest time.

One may, by frauds practiced upon the Government, or through the ignorance or carelessness of an official of the Government, succeed in obtaining the conveyance to himself of the complete legal title to lands of the United States; and the patent or other instrument by which such title is conveyed will not be held void by reason of the fraud or mistake if the person executing the instrument on the part of the United States was invested with the power to do so. Such an instrument, so executed, could only be avoided by a proceeding instituted in the courts for that purpose.

But it is of the essence of such an instrument that the party executing it had the power to do so, for had he not the power such an instrument would be a mere nullity and absolutely void.

In *United States* v. *Burlington, etc., R. R. Co.* (98 U. S., 334), the bill was brought by the United States to annul certain patents issued by them to the defendant company on several grounds, all based upon alleged mistakes of the Land Department in the location of the land for which patents were issued. No question was raised or suggested as to want of power in the executive officer by whom the patents were issued. He had simply exercised erroneously a power with which he was fully invested. The court, after referring to the fact that it had become impossible to identify the lands, said:

> It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the Government may be without remedy; it certainly could not

> insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees.

So, in *Colorado Coal Co.* v. *United States* (123 U. S., 313), after reciting the facts, the court said:

> This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect.

If it be true, then, as we have endeavored to show, that the certification by the Secretary of the Interior of these lands to the State of Minnesota was absolutely void for want of power in the Secretary to make such conveyance, and not merely voidable by reason of the defective exercise of a power with which he was invested, then no direct proceeding was necessary on the part of the United States for the cancellation or recession of the instrument of conveyance, but its nullity will be recognized both by the courts and Executive Departments of the Government.

The counsel in his brief (pp. 39–60) has cited many cases, with copious quotations from some of them, in all of which the power to make the conveyance existed; but the question presented was, how far a conveyance made by the Secretary of the Interior upon an erroneous view as to facts, the ascertainment of which was committed to him, is valid.

We had already considered this question to some extent in our original brief and had there suggested that the law of all the cases had been correctly and clearly stated by Mr. Justice Brewer in *Burfenning* v. *Chicago, St. Paul, etc., R. R. Co.* (163 U. S., 323), and especially to the conclusion stated in that opinion:

> But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, *although culminating in a patent*, transfer no title and may be challenged in an action at law.

Here we insist on behalf of the United States that the Secretary of the Interior was without jurisdiction or power to convey, by certification or otherwise, to the Territory of Minnesota, or to anyone else, lands to which homestead or preemption rights had attached before the line of railroad had been definitely fixed by the filing of a map thereof in the office of the Secretary of the Interior.

In *Steele* v. *Smelting Co.* (106 U. S., 447), Mr. Justice Field, speaking for the court (p. 452), said:

> It need hardly be said that we are here speaking of a patent issued in a case where the Land Department had jurisdiction to act, the lands forming part of the public domain and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of, or reserved from sale, the patent would be inoperative to

> past the title, and objection to it could be taken on these grounds and at any time and in any form of action.
>
> Even a patent may be declared void if issued for lands theretofore reserved from sale. (*Lake Superior, etc., Co.* v. *Cunningham*, 155 U. S., 373, and cases cited.)

And in *Shiver* v. *United States* (159 U. S., 494), it was said:

> Indeed, this court has settled by repeated decisions that the claim of a homestead or preemption entry, made at any time before filing a map of definite location of a railway, prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. (*Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S., 629; *Hastings and Dakota R. R.* v. *Whitney*, 132 U. S., 357; *Whitney* v. *Taylor*, 158 U. S., 85; *Sioux City, etc., Land Co.* v. *Griffey*, 143 U. S., 32.)

If, then, at the time of the certification by the Secretary of these lands to the State of Minnesota, the line of definite location of the railroad had not been fixed by filing the maps in the office of the Secretary of the Interior, no title whatever vested in the railroad, even under a grant by the governor of Minnesota of such land. And if at the time of the filing of such map homestead and preemption rights had already attached, then these were excepted from such grant.

The power is lodged with the Secretary of the Interior to ascertain and determine facts upon the existence of which may depend the conveyance by him of title to public lands of the United States. His determination of

such facts is final and conclusive. But it is going entirely too far to insist, as is done here by counsel for appellee, that the determination as to whether one is or is not a *bona fide purchaser* from or under the United States is a *fact* which the Secretary of the Interior may conclusively establish and determine.

Whether one is such a purchaser or not may—and in this case in large measure does—depend upon the existence of power in the Secretary to convey such lands. For one can not be a bona fide purchaser unless he from whom he purchase have power to sell.

The Secretary can not be the judge of the existence and extent of the powers which he assumes to exercise. In no aspect of this case can it be claimed that the State of Minnesota, or the railroad company, or the land company, or the purchasers from either, were purchasers without *notice*. As we have already shown, the act itself gave notice of the reservation in favor of homestead and preemption claimants. The records of the land offices, both local and general, afforded notice of the existence of the homestead and preemption entries; and also of the official communication from Hendricks, Commissioner of the General Land Office, to the governor of Minnesota, of July 21, 1857 (Rec., 149), that the title of the Territory would not rest under the land grant until the maps of definite location were filed in the office of the Secretary of the Interior.

All these not only put subsequent purchasers upon inquiry, but actually afforded full and complete notice of the outstanding equitable rights of the homestead and preemption entrymen.

We submit that the question of bona fide purchasers can not properly arise in this case, brought under the act of March 3, 1887. The only object of proceedings under that act being to have declared void the certification of lands under railroad grants, if upon the facts proven the court should be satisfied that the lands were certified without authority of law.

In *United States* v. *Sioux City and St. Paul R. R. Co.* (46 F. R., 506), in a suit similar to this under the adjustment act, a cross bill was filed by a number of persons, claiming to be settlers on the lands there in controversy, and to have established rights thereto by entry or settlement. Judge Shiras said:

> I shall not undertake an examination of the equities upon the record as now presented. When the question of the right of the United States to hold these lands against the claims of the railroad companies is finally decided, then the question of the rights of the settlers may arise, but I do not think that question is properly presented in this case.

The adjustment act made all necessary provision for the protection of the rights of other claimants to the lands which had been improvidently certified, after the erroneous certification was canceled. And this view and the claim that the defense of a *bona fide* purchaser will not avail in a case like this appears to be clearly settled in *Burr* v. *Greeley* (3 C. C. A., 357). In that case the railroad company conveyed to the defendant, Greeley, a tract of the land which had been patented to it, which was exempted from the operation of the railroad grant by reason of a preemption filing which had been

attached thereto before the line of the road was definitely located.

Greeley conveyed to Burr, who brought suit against him to recover damages for alleged breach of covenants of warranty. The case came to the circuit court of appeals on appeal from an order sustaining a demurrer to the bill of complaint. In its opinion, the court, composed of Caldwell and Sanborn, circuit judges, and Shiras, district judge, said:

> After the decision in the Dunmeyer case it was plain that as to all lands to which the right of preemption or homestead had attached, prior to the definite location of the line of railroad, the patents issued by the Government to the railroad company were void. (*Ry. Co.* v. *Dunmeyer*, 113 U. S., 629; *Smelting Co.* v. *Kemp*, 104 U. S., 646–7; *Steele* v. *Refining Co.*, 106 U. S., 452; *Wilcox* v. *Jackson*, 13 Pet., 498; *Best* v. *Polk*, 18 Wall., 112; *Doolan* v. *Carr*, 125 U. S., 618.) It was equally plain that the purchasers from the railroad company of such lands acquired no title.

The court then considered the adjustment act, and applied to it the following language:

> To correct the mistake of the land department in patenting lands to the railway company not within its grant, and to relieve as far as practicable all persons from loss or injury by reason of the mistake, and to place all parties as far as it can be done in the same situation they would have been if the mistake had not occurred, Congress passed the *Act of March 3, 1887* (24 Stat., 556). The third section of that act provides in substance that if the homestead or preemption entry of any settler has been

erroneously canceled, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry. But if such settler does not renew his application within the time fixed by the Secretary of the Interior, then such unclaimed land shall be disposed of under the public-land laws, with priority of right to *bona fide* purchasers thereof, if any; and if there be no such purchasers, then to any *bona fide* settlers residing thereon.

The fourth section of the act provides in effect that patents shall be issued to purchasers in good faith, from the railway company, of lands erroneously patented by the company, upon such purchasers making proof of the fact of such purchase at the proper land office, and that the patents issued to such purchasers shall relate back to the date of the original certification or patenting, and that the company shall pay the United States for such lands.

It will thus be seen that in this case the purpose of the readjustment act is recognized to be just what has been claimed, and the court recognizes in the act itself machinery provided by and through which the settler whose rights have been improperly taken away, and the *bona fide* purchaser from or through the railroad can (in the first instance where lands have not been certified or patented, and in the second instance where, having been so certified or patented, the title has been restored to the United States) receive all the protection to which either may be entitled.

It is not here deemed or construed to be the province of the courts to complete the adjustment under the provisions of the act, and it is nowhere intimated in discussing the purpose and effect of that act that the court has such province.

It will be found, too, that the construction put upon the various provisions of this act by the officers of the Interior Department in cases arising within their jurisdiction is in accordance with this view.

On November 17, 1887, Attorney-General Garland, in a letter to Mr. Secretary Lamar (6 Land Dec., 272), stated at length his views upon certain questions submitted to him respecting sections 3, 4, and 5 of that act. Immediately thereafter (*ib.*, p. 276) the Secretary issued his letter of instruction, in which, adopting the views of the Attorney-General, he instructs the Commissioner to proceed at once to adjust the land grants under the provisions of the act above referred to.

So, too, Commissioner Stockslager, by a circular of February 13, 1889 (8 Land Dec., p. 348), which was approved by Secretary Vilas, adopted practically the same construction of the act hereinbefore set out and issued the same for the guidance of the registers and receivers of the United States.

Many questions have arisen in the Interior Department involving the construction and method of procedure under the several sections of the adjustment act, and an examination of the decisions discloses that throughout it has been the opinion of the officers of the Land Department that the act was intended by Congress to correct previous mistakes of the Land Department, to reinstate in certain cases the rights of those who by and through such mistakes were deprived of privileges under the homestead or preemption laws, to protect persons who in good faith had purchased from or under the railroad company, and in general to confirm and establish titles rather

than to destroy or overturn them; and in its operation the court shall be resorted to only for the purpose of restoring to the Government the title to such lands as may have been certified or patented without authority of law and which the company refuses to voluntarily return.

Kearce v. *Little et al.*, 14 Land Dec., 25.
Drake et al. v. *Button*, 14, Land Dec., 18.
N. P. Ry. Co. v. *McKinley*, 14 Land Dec., 237.
Stebbins v. *Cooke*, 14 Land Dec., 498.
Fletcher et al. v. *Breston*, 14 Land Dec., 554.
St. P., M. & N. Ry. Co., 13 Land Dec., 353.
St. L., I. M. & S. R. R. Co., 13 Land Dec., 559.
Cloessner v. *U. S. & P. R. R. Co.*, 12 Land Dec., 280.
Instructions, 11 Land Dec., 229.
Central Pac. R. R. Co., 11 Land Dec., 588.
Wright v. *Coble*, 9 Land Dec., 199.
Winona and St. Peter R. R. Co., 9 Land Dec., 649.

The result of these various decisions, and of the terms of the act itself, leads to the conclusion that Congress did not intend to relegate to the courts the administration of this law, but provided a method for its administration in the Interior Department, and that resort to the courts was contemplated only in the event that the railroad companies receiving lands under erroneous and wrongful certifications, or patentings, should refuse upon demand to reconvey them to the United States, and then only for the purpose of setting aside such certifications or patentings.

But if appellant's claim that the adjustment act was passed for the purpose and has the effect contended for

is not sustained by this court, still the defendants who claim as such can not be protected as good-faith purchasers.

The lands in controversy were excepted from the granting acts, hence no claim can be sustained that by force of the acts themselves any right, title, or interest in the lands passed. Persons purchasing, believing otherwise, must stand charged with knowledge of the restrictions, reservations, and conditions contained in the acts and can not claim to be protected as good-faith purchasers if these lands were, in fact, excepted from their operation under a proper construction. Neither can any claim for protection as a good-faith purchaser be based upon the certification. The lands being excepted from the operation of the acts, never in fact having been granted by Congress, should not have been certified, and the officers of the Land Department, in certifying them, acted wholly without authority or jurisdiction, and such certification conveyed no right, title, or interest whatever.

Burr v. *Greeley*, 3 C. C. A., 357.
Samrpeyreac v. *U. S.*, 7 Pet., 222–240.
Williamson v. *Ball*, 8 How., 566–568.
Gaines v. *New Orleans*, 6 Wall., 642–715.
Moffett v. *U. S.*, 112 U. S., 24–31.
Williamson v. *Barry*, 8 How., 495–544–545–550.
K. P. Ry. v. *Dunmeyer*, 113 U. S., 641–644.
Donlan v. *Carr*, 125 U. S., 624–633.
Smelting Co. v. *Kemp*, 104 U. S., 646–647.
Steel v. *Smelting Co.*, 106 U. S., 452–453.
Wilcox v. *Jackson*, 13 Peters, 511.
Bert v. *Polk*, 18 Wall., 117.
D. & P. R. R. Co. v. *Litchfield*, 23 Howard, 66.

Williams v. *Baker*, 17 Wall., 147.
Homestead Company v. *Valley R. R. Co.*, 17 Wall., 164.
Walcott v. *Des M. R. R. Co.*, 5 Wall., 686.
Litchfield v. *Co. of Webster*, 101 U. S., 774.
Wolsey v. *Chapman*, 101 U. S., 767.
Bullard v. *Des M. R. R. Co.*, 122 U. S., 175.

It is further insisted (Wilson's brief, p. 61) that—

> (c) *It is not open to question but that if the legal title did pass a bona fide purchaser from the railroad company acquired not only the legal but the equitable title, unimpeachable by the United States or anyone claiming under them.*

We have already endeavored to show that the legal title did not pass from the United States to the Territory or State of Minnesota, and also that the subsequent purchasers under the land grant were not purchasers without notice.

In *Doolan* v. *Carr* (125 U. S., 618), the plaintiff introduced a patent from the United States to the Central Pacific Railroad Company for the land in question, dated February 28, 1874; the patent purported to be issued under the act of July 1, 1862, as amended by the acts of July 1864 and March 1865. The defendant offered evidence to show that the patent to the railroad company was issued without authority of law, and therefore void. The means by which he proposed to establish this were by proving certain facts. The plaintiff objected to the proof thus offered, and the court sustained the objection. The court, however, went further, and charged the jury that the patent was conclusive and could not be impeached

collaterally. Justice Miller, delivering the opinion of the court, said (p. 624):

> To this charge the defendants excepted, and the case before us turns upon the correctness of the ruling of the court on the proposition that in this action at law none of the evidence offered by the defendants could be received to impeach the validity of the patent, and that such an issue as that attemped to be raised by the defendants could only be made by a suit in equity to set it aside.
>
> There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions of law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make the conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable. * * * It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issuance.

The judgment of the lower court was reversed on the ground stated by Justice Miller (p. 633):

> We do not doubt that this evidence was admissible for the purpose for which it was offered, and if any oral testimony were necessary to identify the land in controversy as coming within the Mexican grant and the surveys of the Land Office, under the decisions of the courts, we do not think it would be inadmissible, although it is not clear that any such was necessary or was offered.

It of course must be admitted that one who is a bona fide purchaser strictly has become possessed of a title that is impregnable to attack. But it certainly is not true that everyone who acquires the legal title to land becomes a bona fide purchaser thereof, even if the certification here should be held to have passed the legal title, yet that legal title of itself will not be allowed to prevail against the superior equitable rights of existing homestead and preemption entrymen.

Again, it is insisted (Wilson's brief, p. 70) that—

VII.

> *In the administration of the public-land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final.*

This proposition is undoubtedly true, as we have heretofore repeatedly insisted. But the application which the learned counsel seeks to make of it here is not so readily admitted. He assumes that the grant was made

by the Government to the railroad company, whereas it was "to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, etc." And notice was given to the governor of Minnesota at that time by the Commissioner of the General Land Office that title would not vest in the Territory of Minnesota until the maps of the definite location of the railroads were filed in the office of the Secretary of the Interior.

The fact whether such map was or was not filed was not a fact of which the Secretary was the final judge. The public records alone were competent to attest that fact; and it is among the facts agreed in this case that such maps were filed only at the dates hereinbefore stated.

Nor was it left to the judgment of the Secretary of the Interior to determine whether homestead and preemption entries had attached to the land before the date of the filing of the maps of definite location; for these also were matters of public record.

If there were any facts upon the existence of which the certification of these lands was to be made, it might have been competent for the Secretary to have determined conclusively whether or not such facts existed.

But there were none, and the suggestions in counsel's brief are not warranted by anything that appears in this case.

Burfenning v. *Chicago and St. Paul Railway* (163 U. S., 323) states the law too clearly for any misapprehension to exist as to its application.

And Wilson's brief (p. 72):

VIII.

The United States are estopped to question the right or title of the defendant railroad company, or its grantees.

The learned counsel urges that "none of the alleged homestead or preemption claimants are making any claim to any of these lands; if there was any error in certifying them it was solely the error of the officers of the United States."

If none of these claimants are making any claim to any of these lands, we are at a loss to appreciate the true significance of the plaintive—almost pathetic—petition (Rec., 341) to the Commissioner of the General Land Office and Secretary of the Interior, dated 19th March, 1887, signed by more than seventy-five "settlers and occupants of the lands hereinafter more particularly described," and describing most minutely the lands held by them, in which they petition that the Commissioner and Secretary "recommend and direct that suit be brought in the name of the United States to set aside and vacate the erroneous certificates which have been inadvertently issued to the Winona and St. Peter Railroad Company for said lands, as well as certifications to any other company, so that we may be able to enter the same as Government land."

Nor are we able to understand how the "error of the officers of the United States" can be imputed to the United States so as to operate as an estoppel upon it. We may again repeat, in this connection, the language of

Judge Sanborn in *United States* v. *St. Peter and Winona Railroad Company* (67 Fed. Rep., 969):

> There was no intended deception in the conduct or certification of the Government or of any of its officers in this case. They acted in the utmost good faith, and their delay was the result of their honest belief that the land had been properly certified. The negligence of the officers of the Government, however gross, could not raise an estoppel against it. Negligence is but another name for laches. Public policy demands that public interests shall not be prejudiced or jeopardized by the carelessness of Government officials.

The learned counsel makes fervid appeal for his clients on the ground of the great hardship that will result to them and those claiming under them. But, as we have already said, the hardship can not be near so great as that which must fall upon those who more than a quarter of a century ago entered upon this land, and have since continuously held and improved it, relying upon their homestead and preemption rights and upon the good faith of the Government to protect them in the enjoyment of them. The railroad company, and those claiming under it, had the amplest opportunity of protecting themselves by heeding the notice of the paramount claims which the records afforded them.

In *United States* v. *The Dalles Military Road Co.* (140 U. S., 631), this court said:

> It is manifest that, although the act says that the suits are to be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity, Congress intended a

full legal investigation of the facts; and did not intend that the important interests involved should be determined upon the untested allegations of the defendants. They set up, to avoid an actual investigation, staleness of claim, estoppel, laches, the certificates of the governors, and allegations of bona fide purchase. It must be held that in passing the statute of 1889 Congress gave full effect to its three granting acts, and to its act of June, 1874, to the reports made by its committees, and to the acts and proceedings of the Secretary of the Interior, the Commissioner of the General Land Office, and other executive officers. An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defense, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defenses of stale claim and laches can not be set up against the Government.

Finally, it is insisted by Mr. Wilson (p. 79):

IX.

The United States have not such an interest in the subject-matter as to authorize them to maintain this suit.

The first section of the act of March 3, 1887, provides:

> That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads.

Section 2 provides that the Secretary of the Interior shall demand a relinquishment or reconveyance to the

United States of all lands which shall appear to have been erroneously certified or patented by the United States, to aid in the construction of a railroad; and directed the Attorney-General—

> to commence and prosecute, in the proper courts, the necessary proceedings to cancel all patents, certifications, or other evidence of title heretofore issued for such lands and to restore the title thereof to the United States.

It is well settled by the decisions of this court—and will hardly at this late day be disputed—that all lands within the limits of a railroad grant, which, prior to the filing of the map of definite location of said railroad, have been disposed of by the United States, or to which homestead or preemption rights have attached, and which disposition, or entries, have been rescinded or canceled, revert to the United States and become a part of the public domain and do not inure to the railroad grant.

So that, if any such exist in this case—and the agreed statement of facts shows that they do—then there seems to be hardly a question as to the right of the United States to maintain this action.

It appears in the record that many attempts to enter and file upon these lands have been made since the original homestead entries and preemption filings are claimed to have been canceled. It appears also that certain settlers, who claim to have settled under the laws of the United States upon various tracts of the land in controversy, petitioned the Interior Department to commence this suit.

Even if the United States has no pecuniary interests, it is under obligation to the public, as well as to claimants, to maintain this action if by the conduct of the officers of the Interior Department a certification of the land has been erroneously made. It is the *duty* of the Government to see to it that the public-land laws are justly and fairly administered. This duty has been undertaken and the right of the United States to maintain such proceedings as this has been frequently recognized by this court. (*United States* v. *The M., K. & T. Ry. Co.*, 141 U. S., 386; *United States* v. *Beebe*, 127 U. S., 342; *United States* v. *San Jacinto Tin Co.*, 125 U. S., 286; *Williams* v. *United States*, 138 U. S., 517.)

HOLMES CONRAD,
Solicitor-General.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 321.

UNITED STATES OF AMERICA,
Complainants and Appellants,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY, ET AL.

BRIEF OF THE DEFENDANTS, THE WINONA & ST. PETER RAILROAD COMPANY AND THE MINNESOTA LAND AND INVESTMENT COMPANY.

BRIEF OF FACTS.

THOMAS WILSON,
Solicitor for the defendants, the Winona & St. Peter Railway Company and the Minnesota Land and Investment Company.

Even if the United States has no pecuniary interests, it is under obligation to the public, as well as to claimants, to maintain this action if by the conduct of the officers of the Interior Department a certification of the land has been erroneously made. It is the *duty* of the Government to see to it that the public-land laws are justly and fairly administered. This duty has been undertaken and the right of the United States to maintain such proceedings as this has been frequently recognized by this court. (*United States* v. *The M., K. & T. Ry. Co.*, 141 U. S., 386; *United States* v. *Beebe*, 127 U. S., 342; *United States* v. *San Jacinto Tin Co.*, 125 U. S., 286; *Williams* v. *United States*, 138 U. S., 517.)

HOLMES CONRAD,
Solicitor-General.

165-463

165-463

NOV 6 1896

JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 321.

UNITED STATES OF AMERICA,
Complainants and Appellants,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY, ET AL.

BRIEF OF THE DEFENDANTS, THE WINONA & ST. PETER RAILROAD COMPANY AND THE MINNESOTA LAND AND INVESTMENT COMPANY.

BRIEF OF FACTS.

THOMAS WILSON,

Solicitor for the defendants, the Winona & St. Peter Railway Company and the Minnesota Land and Investment Company.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 321.

UNITED STATES OF AMERICA,
Complainants and Appellants,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY, ET AL.

BRIEF OF THE DEFENDANTS, THE WINONA & ST. PETER RAILROAD COMPANY AND THE MINNESOTA LAND AND INVESTMENT COMPANY.

BRIEF OF FACTS.

By the act of March 3, 1857 (11 Statutes, 195), the United States granted to Minnesota, for the purpose of aiding in the building of certain lines of railroad, the alternate odd-numbered sections for six sections in width on each side of the line of each road. It was by said act provided:

Sec. 1. But in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much of such lands in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid. * * * *Provided* [this is the first proviso of said section], that the land to be so selected shall in no case be further than fifteen miles from the lines of said roads and branches and selected for and on account of each of said roads or branches. *Provided, further*, that the land hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever. And provided, further, that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improve-

ment or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act. * * *

Sec. 2. That the sections and parts of sections of land which by such grant shall remain in the United States within six miles on each side of said roads and branches shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

Sec. 3. And be it further enacted that the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the Legislature thereof, for the purposes herein expressed and no other, and the said railways and branches shall be and remain public highways for the use of the government of the United States free of toll or other charge upon the transportation of any property or troops of the United States.

By the act approved March 3, 1865 (13 Stats., 526), amending the said act of 1857, it was provided:

Sec. 1. That the quantity of lands granted to the State of Minnesota to aid in the construction of certain railroads in said state as indicated in the first section [of said act] * * * shall be increased to 10 sections per mile for each of said roads and branches subject to any

and all limitations contained in said acts and subsequent acts as hereinafter provided.

Sec. 2. That the first proviso in the first section of the act aforesaid shall be so amended as to read as follows, to-wit: "provided that the land to be so selected shall in no case be further than 20 miles from the line of said roads and branches to aid in the construction of which said grant is made, and said lands granted shall in all cases be indicated by the Secretary of the Interior."

Sec. 3. That any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or any other purpose whatsoever, be and the same is hereby reserved and excepted from the operations of this act except so far as may be found necessary to locate the route of said roads through such reserved lands. * * *

Sec. 4. That the sections and parts of sections of land which by said acts and this grant shall remain in the United States within ten miles on each side of said roads and branches, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale or private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid.

The Winona & St. Peter Railroad Company, one of these defendants, hereinafter called the Winona Company, and the St. Paul & Sioux City Railroad Company, hereinafter called the Sioux City Company, were beneficiaries of that grant.

By an act of Congress approved May 12, 1864 (13 Stats. 74), there were granted to Minnesota to aid in the construction of the lines of the said Sioux City Company "*four additional alternate sections per mile to be selected upon the same conditions, restrictions and limitations as are contained in the act of congress* * * * [of March 3, 1857, first above referred to] *Further provided, that the land to be so located by virtue of this section may be selected within 20 miles of the line of said road, but in no case at a greater distance therefrom.*"

The State granted to each of these companies the lands granted in aid of its line, and each within the time and in the manner specified and required by the laws of the United States and the State, built, equipped and put in operation its line of road, (with a slight exception on the part of the Sioux City Company, which need not be referred to, as it cuts no figure in this case) and each became entitled to all the lands granted in aid of its line so constructed. (Stipulation of facts, Record page 45, Subdivision 9, and page 48, Subdivision 15.)

The Secretary of the Interior certified the lands in question to the State. Some in the

year 1862, most of them in 1873 and 1874, and three tracts (760 acres) in 1879. (Exhibit "A" annexed to the answer of the Winona Co. Record, page 27-28, and Subdivision 10 of stipulation of facts, Record page 45.)

Exhibit "A," which is a list of the lands in the bill of complaint described, shows the date at which and the company for which each tract was certified to the State. *All of these lands lie within the place limits of the Winona Company, and they all lie outside of the place limits and within the indemnity limits of the Sioux City Company*, except the W. ½, 29-110-27, which lies in its ten mile limits. (Record, page 45, subdivision 10, and pages 27-28.) *It is to be noted that about one-half of them were certified to the state for the Sioux City Company.* The defendant railroad company built its road past all, and over some, of these lands and through its entire length before 1873. Some of its stations were built on some of them. (Record, page 48, subdivision 15 and pages 347-348.) They were placed in the market from the eastern terminus as far as Rochester, in range 14, as early as 1865, as far west as range 31 in 1872 or 1873 (Ib. 95-97), and to the west end of the grant as early as 1876 (Ib. 96, 108-109). They were extensively advertised for sale as early as, and continuously after, 1876 (Ib. 98-99, 108-109, 118-119).

In 1879 this defendant railroad company sold most of them to the defendant land company

and the latter company was sued for and compelled to pay taxes thereon for about twenty years, to the amount of over $8,000 (Ib. 117-126, 347-348, 353-354).

Litigation was begun in the United States land office in 1872 or 1873, and in the Courts in 1875, between the Sioux City Company and the Winona Company, about the title to these lands, which continued in the State and Federal Courts until the decision of this Court in 1885. (Ib. 96-98.)

St. Paul Railroad Company vs. *Winona Railroad*, 112 U. S. 720.

And litigation between said land company and this defendant railroad company, touching tile to some of these lands, was begun in the State Court in 1878, and transferred to the Federal Courts and ended in 1887. (Record, pages 97-98.)

Winona & St. Peter R. R. Co. vs. *Barney* 113 U. S. 618.

Ib. 117 U. S. 228.

In both of those suits it was decided that this defendant railroad company, had earned and was entitled to those lands.

In March, 1877, one Ashbel H. Barney, the grantee of the defendant railway company, of one quarter-section of these lands, brought an

action of ejectment against Thomas McOuatt in the Circuit Court of the United States for the District of Minnesota to recover the possession. McOuatt thereupon filed in said Court his bill in equity to enjoin Barney from prosecuting that action at law and alleging that he (McOuatt) was entitled to said tract under the pre-emption laws of the United States, and that it was excepted from the railroad grant by a pre-emption filing thereon of one White, which existed at the date of the grant and of the definite location of the road. In that suit in equity the very question presented to the Court here was the question insisted on by the complainants and litigated and decided. After hearing all the evidence introduced by the parties, the Court, Judges Dillon and Nelson presiding, dismissed the bill. (Record, pages 192–207 inclusive, and pages 347–8.)

Except as aforesaid, until about the time this suit was begun, no adverse claim was made to these lands. (Record, pages 99, 100, 109, 110, 118, 119, 125, 126.)

Before this suit was begun or any adverse claim made to these lands, they had all, but 240 acres, been sold to bona fide purchasers for value without notice of any infirmity of title in the railroad company or any of its grantees (Record 109, 110); and the 240 acres not disposed of are part of those certified to the State for the Sioux City Company as aforesaid.

It is admitted and stipulated:

> That it appears from the records and files of the general land office that homestead entries or pre-emption filings *prima facie* regular and valid were made upon all the several tracts of land in the bill of complaint described, by the persons and at the place and times therein set forth. That such proceedings were had thereon, that the proper officer, *before said lands were certified to the state as aforesaid*, canceled all such entries or filings at the times, in the manner and for the reasons set forth in the schedule marked Exhibit "IX" (Record, page 55 *et seq.*); which schedule further shows all the subsequent attempted entries of said lands or filings thereon, and the disposition of such attempted entries or filings. And * * that none of the persons who made such homestead entries or pre-emption filings have since claimed said lands, as far as shown by the records of the land department of the United States. *And after said filings had been so canceled and set aside, and before the lands were certified to the state as aforesaid, the St. Paul & Sioux City Railroad Company selected the lands so certified by the state for it as aforesaid as inuring to it under its said grants.*
>
> (Record, page 45, subdivision 11.)

It is admitted also that all of the lands selected by and certified for the Sioux City Company, were necessary to fill its grant. (Ib. page 45.) It is also further stipulated as follows:

That on, before and for a long time after the certification of the lands in question to the state on account of the railroad grants (*i. e.* June 1879) it was uniformly held and ruled by the Secretary of the Interior and the other officers of the land department of the United States:

(*a*) That the line of a railroad became and was definitely fixed so as to attach the grant to the odd numbered sections within the granted limits as soon as surveyed, staked out and marked on the face of the earth:

(*b*) That a homestead entry in all respects regular and legal excepted the land covered thereby from the operation of a railroad grant attaching during the existence of such entry; that the validity of a homestead entry was open to question by the company, and if it was shown that such entry was fraudulent or irregular in its inception or that it had been abandoned before the right of the road attached, it was held not to except the land from the grant, but the burden of so showing was upon the company, and in the absence of such proof, the entry being valid upon its face, was held to except the land from the grant, even though subsequently abandoned:

(*c*) That a pre-emption claim, which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned, and not consummated, even though in all respects legal and *bona fide*, was held not to operate to

defeat the grant, but, upon the failure of such claim, the land covered thereby was held to inure to the grant as of the date when such grant became effective. * * *

(g) That in pursuance of and in accordance with the aforesaid rule, the grants to and for each and all of the land grant railroad companies, in the State of Minnesota, were, before, at, and for a long time after the certification of the lands in question, administered.

Record, page 46, subdivision 12a to 12g inclusive:

This suit is instituted under the act of March 3, 1887 (24 Stats. 556), and the ground on which the complainants claim the right to recover is that before the map designating the lines of definite location of the Winona Company *was filed with the Secretary of the Interior* there were certain homestead entries or pre-emption filings on these lands which it is claimed excepted them from the grant and that the certification to the State was absolutely void.

The relief prayed for is, that the lands "*be restored*" to the United States,—that the certification thereof to the State and the conveyance by the State to the defendant railroad company and the conveyance by the defendant railroad company to the defendant, the Winona & St. Peter Land Company, and each and all of the conveyances to any of the defendants herein of any of said tracts of land be set aside and canceled, and for such further

relief as may be just. (Record, page 16.) Neither the case stated in the bill nor the proofs would have justified any relief under the prayer for general relief, nor was either Court requested to grant any other relief than that specially prayed for. See also assignments of error. (Record, pages 415-416.)

The defendants contend, among other things; —that the certification of these lands was the equivalent of a patent,—that the burden is on the complainants *to show conclusively* that the act of the Secretary in certifying them was unauthorized and illegal, and that they have failed in this;—that these lands were legally certified to the State for the defendant railroad company on any construction of the statute;—that even if this were not so, it being shown and conceded that they were certified according to the law as then and theretofore uniformly construed, and this having been and become a rule of property for a quarter of a century or more, the law as now construed should not be given a retroactive effect so as to devest rights vested under the pre-existing rule;—that the defendant railroad company being entitled to these lands, or, in case they were excepted from the grant, to an equal number of lieu lands, and the Secretary having indicated these as lands enuring to the grant, and certified them to the State for this defendant railroad company and charged them to it as part of its grant, and the United

States having since appropriated and disposed of the lands to which it would have been entitled in lieu of these, they are in equity estopped to claim these:—that even if the certification of the Secretary was erroneous, it was not absolutely void, and therefore the bona fide purchasers from the railroad company took an indefeasible title. The Circuit Court dismissed the bill for want of equity, and the United States Circuit Court of Appeals affirmed the judgment of that Court.

U. S. vs. *Winona & St. Peter R. Co., et al.*, 67 Fed. Rep., *et. seq.*

Record, 391, *et seq.*

And this case is here on the appeal of the United States.

POINTS AND AUTHORITIES.

I

WHILE IT IS ADMITTED THAT AS THE LAW IS NOW SETTLED BY THIS COURT A HOMESTEAD ENTRY OF PRE-EMPTION FILING ON A TRACT OF LAND WITHIN THE PLACE LIMITS OF A RAILROAD GRANT WHEN THE LINE IS DEFINITELY FIXED EXCEPTS THAT TRACT FROM THE GRANT, AND THAT A LINE OF ROAD IS NOT DEFINITELY FIXED UNTIL THE MAP SHOWING THE DEFINITE LOCATION IS FILED WITH THE SECRETARY OF

THE INTERIOR, WE CONTEND THAT THIS RULE SHOULD NOT BE IN THIS CASE APPLIED SO AS TO DEVEST RIGHTS VESTED ACCORDING TO THE PRE-EXISTING RULE.

To so apply the rule would work incalculable injury and injustice. As said by Chancellor Kent:

> To permit a subsequent decision in any one given case on a point of law to open or annul anything that has been done in other cases of the like kind for years before under a different understanding of the law would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found.

Lyon vs. *Richmond*, 2 Johnson Ch., 60.

The Supreme Court of Minnesota thus states the law in such a case:

> Decisions which have been acquiesced in and acted upon for many years, and have become rules of property, to question which is to throw a cloud on innumerable titles, are and ought to be absolutely final.

Barton vs. *Drake*, 21 Minn., 303.

If any rule of law can be said to be settled both by reason and authority, this is: That when a line of decisions, whether originally right or wrong, has become a rule of property,

as the early rule in this class of cases had, it will thereafter be followed without question as to transactions entered into in reliance on such rule.

Bank of Utica vs. *Mersereau*, 3 Barb. Ch., 530, 577.

U. S. vs. *The Ship Recorder*, 1 Blatch., 218.

Stuart vs. *Laird*, 1 Cranch., 299, 309.

Rogers vs. *Goodwin*, 2 Mass., 477, 478.

The following language of this Court is applicable to the facts of this case:

> Such has been the uniform construction given to the acts by all departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question.

U. S. vs. *Burlington, R. Co.*, 98 U. S., 341.

U. S. vs. *McLaughlin*, 30 Fed, 147, 157, was like this, a suit by the United States to vacate certain patents to the defendant railroad company on the grounds that the lands patented were excepted from the grant, and one question in that case, as in this, was when the line was definitely located. It was tried

before Sawyer, Circuit Judge, and Sabin, District Judge. Judge Sawyer, delivering the opinion of the Court, said (page 157):

> Aside from the strictly legal aspect of the rights of the parties, in our judgment, the equities of the case imperatively demand that the Court should treat this question as to when the road was definitely located in the same manner as it was treated by the executive branch of the government, and by the parties until after the issue of these patents.

This doctrine has been frequently applied by this Court in the municipal bond cases.

The facts in the case at bar bring it clearly within the doctrine of the cases cited. Nearly a quarter of a century ago these lands were, by the Secretary of the Interior, "indicated" as lands enuring to the defendant company under its grant and certified to the State for it. Confessedly this was done in strict accordance with the law, as it was then, and for about twenty years before construed by the officers of the United States, whose duty it was to construe and administer such grants. This is stipulated by the compalinants. Record, page 46. See to same effect letter of Commissioner of the General Land Office—*Thomas A. Hendricks*—of March 30, 1858, construing this very grant. Record page 150–152. See also:

Rees vs. *Cent. Pac. R. Co.*, 5 Land Dec. 80.

Larson vs. *St. P. & Pac. R. Co.*, 2 Copps Land Laws, 862-863.

Vincent vs. *St. Joseph & Denver City R. Co.*, 2 Copps Land Laws, 897–898.

Kniskern vs. *Hastings & Dakota R. Co.*, 2 Copps Land Laws, 858, 860.

Emerson vs. *South Pac. R. Co.*, 1 Land Dec., 390. Circular of Instructions of Interior Dept. of Nov. 7, 1879. 2 Copps Land Laws, 715, 716, *et seq.*

Gates vs. *Col. & O. R. Co.*, 2 Copps Land Laws, 893–896.

Report of Commissioner General Land Office for 1879, pages 252–253.

"The Public Domain," pages 282–283.

1 Lester's Land Laws, 509, 510, 511, 512, 513, 537, 538.

1 Copps Land Laws, Edition 1860, pages 364, 366, 372, 374, 384, 385, 426.

White vs. *Hastings & Dak. R. Co.*, 2 Copps Land Laws, 878–880.

THE LAW ASSOCIATION —OF— PHILADELPHIA

The defendant railroad company had no right or power to elect whether it should take these lands or indemnity therefor, nor were these rules adopted or decisions made by the mere executive officers of the government. As the reports of this Court and the Interior Department show, they were considered, settled

and concurred in by at least one Attorney General, by different Secretaries of the Interior and Commissioners of the General Land Office—some of them being among the ablest lawyers in the United States—and after the law had been thus construed, and before these lands were granted or certified for the defendant railroad company, the United States made many other grants in the same, or substantially the same, language.

See Lester's Land Laws. *Passim.*

The same construction was placed on the law, too, by the ablest Courts of the country when called upon to construe those grants. See McOuatt's case referred to below:

N. P. R. R. Co. vs. *Watts*, 2 Dillon, 310.

U. S. vs. *McLaughlin*, 30 Fed. Rep., 147, 157, and cases there cited.

Under these circumstances, it goes without saying that that has become a rule of property.

The defendant railroad company sold to the other defendants, who purchased in good faith, and many of whom have spent nearly a lifetime in giving value to their lands. There is not a scintilla of evidence to cast a doubt on the perfect good faith of each and all of the defendants.

If this defendant railroad company is to blame in the premises, the head and front of its offending is that it relied and acted not

only on the decisions of the land department of the United States and of the Courts, but also on the construction placed on the law by Congress: for the action of Congress, in making grants in the same language after this known construction, might well be construed as an acquiesence in and an affirmance of that construction.

Many of the alleged filings and entries were made after the line of the defendant railroad company was definitely located on the face of the earth opposite and past these lands, and therefore (according to the then settled rule of the Interior Department and the Courts) after the line was definitely fixed. Stipulation, Record, page 46, subdivision 12. See map of definite location, a copy of which complainants are to produce, Record page 44, Sub. 7, Stip. of Facts, Record page 43 and Ex. "A" to defendant's answer, Record pages 27–28.

If the rule now insisted on by complainants had then been applied by the officers of the United States, the defendant railroad company could legally have relinquished these lands under the Act of June 22, 1874 (18 Statutes, 194) and selected others in even numbered sections in lieu of them. That statute provides:

> That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for rail-

> road purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which by the decision of the Land Office the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the land so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands, not mineral, and within the limits of the grant, not otherwise appropriated at the date of selection, to which they shall receive the title the same as though originally granted.

There were then ample lands within the limits of the grant to have made good the loss which the United States have since appropriated and disposed of, and there remain within the limits of the grant none from which such loss could be made good. See testimony of Freeman, Record, pages 114–115.

Under these circumstances, we contend that it would be unjust to give the statute as now construed the effect of invalidating transactions consummated under the prior rule.

II.

IF UPON ANY STATE OF FACTS A CONVEYANCE OR PATENT MIGHT HAVE BEEN LAWFULLY ISSUED, THE COURT WILL PRESUME AS

AGAINST SUCH ATTACK AS THIS, THAT THE FACTS JUSTIFYING IT EXISTED, AND TO OVERCOME THAT PRESUMPTION THE EVIDENCE MUST BE CLEAR AND CONCLUSIVE.

Smelting Co. vs. *Kemp*, 104 U. S. 646.

Polks Lessees vs. *Wendell*, 5 Wheat. 304.

Bank of U. S. vs. *Dandridge*, 12 Wheat. 69, 70.

Bagnall vs. *Broderick*, 13 Pet. 450.

Field vs. *Seabury*, 19 How. 323, 332.

Hughes vs. *U. S.*, 4 Wal. 232, 236.

Jackson vs. *Lawton*, 10 John. 213.

Delassus vs. *U. S.*, 9 Peters, 134.

Minter vs. *Crommelin*, 18 How. 87, 88.

Clements vs. *Machebeouf*, 92 U. S. 425.

Maxwell Land Grant Case, 121 U. S. 379, 382.

Colorado Coal Co. vs. *U. S.*, 123 U. S., 316 to 321 inclusive.

Jackson vs. *Cole*, 4 Cowen 596, 597.

U. S. vs. *Budd, et al.*, 144 U. S. 154.

U. S. vs. *Meeker*, 50 Fed. 146, 147.

In *Minter* vs. *Crommelin*, Justice Catron, delivering the opinion of the Court, said:

> The State Court in effect pronounced the patent, under which the plaintiffs claimed title, to be void for want of authority in the officers of the United States to issue it, on the supposition that the land was reserved from sale when it

> was entered and granted. *The presumption is, that the patent is valid, and passed the legal title; and furthermore, it is prima facie evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent.* It has been so held by this Court in many instances, commencing with the case of *Polk* vs. *Wendell*, 9 Cranch. 98, 99. (18 How. 88.)

In *Maxwell Land Grant Case*, which was a suit in equity to set aside a land patent, Mr. Justice Miller delivering the opinion of the Court, stated the law as follows:

> The great importance of this case, as regards the immense quantity of land involved and its value, reinforced by the circumstance of the number of cases coming before the Courts, in which, under the directions of the Attorney General, attempts are made to set aside the decrees of the Courts, the patents issued by the government, and in this case, an act of Congress, seems to call for some remarks as to the nature of the testimony and other circumstances which will justify a Court in granting such relief. The cases of this character which have come to the Supreme Court of the United States have been so few in number that but little has been said in regard to the general principles which should govern their decision. There are decisions enough to guide us in cases where a patent or other title derived directly from the government has been questioned in a collateral proceeding, brought to enforce that title or to assert

a defence under it; but the distinction between this class of cases, in which all the presumptions are in favor of the validity of the title, and in regard to which a wise policy has forbidden that they should be thus attacked, and those like the present, in which an action is brought in a Court of Chancery to vacate, to set aside, or to annul the patent itself, or other evidence of title from the United States, is very obvious. *In either case, however, the deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, demands that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the Court, and that the case itself must be within the class of causes for which such an instrument may be avoided.* * * * In the case of *Johnson* vs. *Towsley*, 13 Wall. 72, the Court considering the force and effect to be given to the actions of the officers of the land department of the government, announces the doctrine that their decision, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in Courts of Justice, when the title afterwards comes in question. But that in this class of cases, as

> in all others, there exists in the Courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belongs to another, to give the proper relief. These propositions have been repeatedly reaffirmed in this Court.

After reviewing numerous cases, the learned justice added:

> *We take the general doctrine to be, that when in a Court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should*

> *only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.* It is not to be admitted that the title by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the president of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a Court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.
>
> (121 U. S. 379, 382.)

In *Colorado Coal Company*, vs. *U. S.*, *supra*, Mr. Justice Mathews, delivering the opinion of the Court, commenting on the last case, said:

> *It thus appears that the title of the defendant rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing such proofs and establishing the conclusions to which they are directed, rests upon the government (the complainant.) Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish.* (123 U. S. 317.) See also *United States* vs. *Budd*, 144 U. S. 160, 162.

In *Stockbridge Co.* vs. *Hudson Co.*, 107 Mass. 290, cited with approval by Justice Miller, in the *Maxwell Land Grant Case*, it is held that in such cases the complainant's case must be made beyond a reasonable doubt to justify a recovery.

Under the circumstances of this case, both reason and the decisions of the highest Courts of this country and other countries sustain the position that, in the absence of the most plenary and certain proof to the contrary such titles will be held valid. The stability of titles and the security of property rights require that such presumption should be conclusive until overcome by the most indubitable proof. Were it otherwise the title to hundreds of thousands of acres of land in the single State of Minnesota which has been unquestioned for nearly a generation would be unsettled, and homes of many thousands of settlers rendered insecure. Our State would be a paradise for land sharks,—for it should be borne in mind, not only that the local land officers are not generally methodic or accurate, and that they have been changed with each administration and the papers in their offices probably destroyed or mislaid. The land offices have also been frequently changed or abolished and nearly all the witnesses to the transaction are dead. After the land grants were administered and the lands conveyed to the company entitled to them, orders of withdrawals, (merely let-

ters) diagrams, and lists of selection were naturally not longer considered of value or importance, and hence were mislaid or destroyed.

It is for these, among other reasons, that, when an attempt has been made to unsettle such titles, the Court has held it incumbent on the complainant to furnish the most conclusive proof that the title which had passed could not under any circumstances be legally upheld. In pursuance of this rule in *Colorado Coal Company* vs. *U. S. Supra* this Court held that *the complainant was bound to call all such witnesses and offer such proofs as it appeared might have thrown any light on the question.*

We have thus at length dwelt on this question of the burden of proof, and *quantum* of evidence required in such cases, because the learned counsel for complainants in the lower Court proceeded on the assumption that a mere suggestion of mistake or error in fact or in law, and proof that there *might have been or probably was such mistake was sufficient* to make his case.

III.

THE CERTIFIED LISTS OF THESE LANDS BY THE SECRETARY OF THE INTERIOR TO THE STATE CONVEYED AS COMPLETE A TITLE AS A PATENT.

Frasher vs. *O'Connor*, 115 U. S., 102.
Chandler vs. *Calumet Co.*, 149 U. S., 92.

U. S. vs. *Des Moines Co.*, 142 U. S., 541.

Curtner vs. *U. S.*, 149 U. S., 662, 675.

Minn. Land and Inv. Co., 40 Minn., 455–457–8.

W. St. Paul Co. vs. *Ebilcisor*, 52 Minn., 312.

So. Minn. R. Co., vs. *Kufner*, 2 Land Dec., 492.

See also Land Grant Act of Congress of March 3, 1865, above referred to, Sections 3 and 6, and Act of Congress of July 15, 1866, 14 U. S. Statutes, 97, Section 3, which expressly authorized and directed the Secretary of the Interior to patent and certify to the State all the lands then or theretofore granted to the Territory or State in aid of the construction of railroads.

IV.

THE COMPLAINANTS HAVE FAILED TO PROVE THAT, ACCORDING TO ANY CONSTRUCTION OF THE STATUTE, THESE LANDS WERE EXCEPTED FROM THE GRANT TO THE DEFENDANT RAILROAD COMPANY.

Lands that would probably fall within the limits of a grant in aid of a railroad are not infrequently withdrawn for the benefit of the road before the line is definitely located.

Spencer vs. *McDougall*, 159 U. S., 62.

Wis. Cent. R. Co. vs. *Forsythe*, 43 Fed., Rep. 867.

Atl. & Pac. R. Co., 2 Dec., Sec. of Int., 562, 568.

In re Julius A. Barnes, 6 Land Dec., 522–526.

McFarland vs. *H. and D. R. Co.*, 12 Land Dec., 228, 229. Record, pages 145, 146, 147, 148, 149.

And the record in this case shows that the lands in aid of this very line were ordered withdrawn a considerable time before the line was located, and long before these entries or filings were made. See letter of Thomas A. Hendricks, Commissioner General Land Office, to Governor Medary, Record, p. 149.

After such withdrawal no homestead or preemption right to the lands could legally be initiated as against the grant.

Spencer vs. *McDougal*, 159 U. S., 62–65.

St. Paul & P. R. Co. vs. *N. P. R. R. Co.*, 139 U. S., 18.

Hamblin vs. *Western Land Co.*, 147 U. S., 531, 536.

Even if there were no evidence that these lands had been so withdrawn, as it has been above shown, it will be presumed that they had. Every presumption exists in favor of the title.

That presumption a complainant in such case was bound to overcome, and, as said by this Court: "He is not relieved of this obligation by the negative nature of the proposition he is bound to establish." They also

failed to show the alleged pre-emption entries and homestead filings which it is contended excepted these lands from the railroad grant. The only evidence which they offered to establish these facts is the stipulation

> That it appears from the records and files of the General Land Office that homestead entries or pre-emption filings, *prima facie* regular and valid, were made upon all the several tracts of lands in the bill of complaint described, by the persons and at the places and times therein set forth; that such proceedings were had thereon that the proper officer, before such lands were certified to the State aforesaid, cancelled all such entries or filings at the times, in the manner and for the reasons set forth in the schedule hereto attached, marked "Exhibit IX" and made a part hereof. * * * And it is further stipulated that none of the persons who made such homestead entries or pre-emption filings set forth in the bill of complaint have since claimed said lands, as far as shown by the records of the Land Department of the United States.

(Record, page 45, subdivision 11, and schedule Exhibit IX, Record, page 55, *et seq.*)

We contend that this was not competent evidence, and does not prove anything. Exhibit IX on its face does not purport to be aught else than mere memoranda or extracts made or taken by some clerk from some other records, papers or files; and even if the

books and files of the General Land Office had been offered to establish these facts, they could not have been received as evidence. This Court will take judicious notice that they of necessity must only have been at best copies of or extracts from, the entries made by the local land officers in their books, or memoranda or letters transmitted to the General Land Office by local land officers. This was, therefore, mere hearsay, *and even if competent, it was insufficient.*

It was incumbent, as has been shown, on the complainants to produce any evidence that might throw any light on the questions at issue and to produce the best and conclusive evidence to establish their contention. This evidence, even if competent, would not have been sufficient to overcome the presumption in favor of the title of the defendants.

V.

THE EVIDENCE AFFIRMATIVELY SHOWS THAT THE LINE OF ROAD WAS DEFINITELY FIXED PAST MOST OF THESE LANDS AND THE MAP THEREOF FILED WITH THE SECRETARY OF THE INTERIOR BEFORE THE ALLEGED FILINGS AND ENTRIES.

All of the lands except three subdivisions (240 acres) lie between Ranges 32 and 37, inclusive (Record, pages 27–28), and this defendant railroad company surveyed, staked out

and fixed its line on the face of the earth from the west line of Range 31 to the west line of Range 37 on and before April 9, 1864, and on April 12, 1864, filed a map thereof in the office of the Register of the United States Land Office in the District in which the lands lie, and the Register forwarded that map to the Commissioner of the General Land Office on April 15, 1864. It was received, so far as the evidence shows, in the usual course of mail. This ante-dated most of these filings and entries. (Record, page 43, 51–52.)

This map the Commissioner, on April 28, 1864, returned to the Register

> That the Governor's certificate may be added thereto, and that the several dates may be added to the map of the line of road as surveyed on the ground from point to point.

Adding:

> It is necessary that the map of survey should be transmitted to the department by the Governor of the State. On its being received throuhg him and accepted by the department you will be directed to withdraw the odd numbered sections from sale and pre-emption.

Subsequently, on or before August 3, 1864, the map with the Governor's certificate and the dates of survey added was

filed in the General Land Office. (Record, page 43–44, Subdivision 7, and pages 52–53). On the tenth day of the same month the Commissioner of the General Land Office sent to the local land officers a diagram showing definitely the place and indemnity limits of the grant through these ranges and directed the withdrawal of the odd numbered sections, adding:

> *The rights of preemptors are governed by the date of actual survey or laying down of the line of road as designated on the map.* (Record, page 53.)

This was in strict accordance with the law as it was then and theretofore and for many years thereafter construed. (Stipulation, Record, page 46, Subdivision 12a, and authorities above cited.)

It thus appears that the sole object in returning that map was to obtain the signature or certificate of the Governor and the dates of the survey, and that it was not intended thereby to postpone the definite location of the line. *The sufficiency of the map as a location of the line was not questioned. On the contrary, it was impliedly approved.*

The signature or certificate of the Governor was not essential, nor was it essential that the map should be forwarded by the Governor. In fact, as the record shows, it was not afterwards forwarded by him, but by A. H. Barney,

treasurer of the railroad company. The dates of the survey in the field were also unimportant on the theory of this bill. It is clearly to be inferred from the record that that map would not have been returned if it had been supposed that it would postpone the definite location of the road or the rights of the railroad company, as against pre-emption filings or homestead entries thereafter to be made. It was manifestly understood that the right of the railroad company was, and intended that it should be, prior and paramount to any such subsequent filings or entries. No one was misled or prejudiced by the return of the map.

This suit is an attempt by the complainants to take advantage of an alleged technical error of their own officers, for which none of these defendants were responsible, and which in no respect in the least prejudiced the complainants or any person claiming any right to these lands as against the railroad company. Nor, as we shall hereafter see, did it add one acre of land to the grant. It should, therefore, not be held to have postponed or prejudiced the rights of these defendants.

Atlantic Gulf Ry. Co., 2 Land Dec., 561.

Van Wyck vs. *Knevals*, 106 U. S., 360, 366–7.

K. P. R. Co. vs. *Dunmeyer*, 113 U. S., 629, 636–7.

The aid of a Court of equity cannot be successfully invoked in such a case.

VI.

EVEN IF THE POSITIONS ABOVE TAKEN WERE UNTENABLE, STILL THIS SUIT CANNOT BE MAINTAINED FOR THE FOLLOWING REASONS:

(a) *So far as the lands in question, certified to the State for the Sioux City Company are concerned, both the legal and equitable title passed to the State from the United States by such certification.*

They were within the indemnity limits of that company's grant, and necessary to fill it. They were duly selected by it. When they were selected they were public lands of the United States, for all the alleged prior entries or filings had been set aside. (Record, page 45, subdivision 11.) *Prima facie*, therefore, and in accordance with the unambiguous language of the grant, the right of that company to select them and the duty of the Secretary of the Interior to certify them to the State for it were clear unless the Winona Company had a prior right to them (and this suit is maintainable only on the theory that the Winona Company had no right to them whatever.) And if they were properly certified to the State, of course that is a conclusive answer to the suit, for manifestly the

United States *could not* maintain an action to recover lands which it had properly conveyed away, nor does the act of 1887 countenance any such absurdity. That act provides that:

> *If it shall appear* * * * *that lands have been erroneously certified or patented* to or for the use or benefit of any company * * * it shall be the duty of the Secretary of the Interior *to thereupon demand from such company a relinquishment or reconveyance* to the United States of all such lands * * * *and if such company* shall neglect or fail to so reconvey * * * *it shall thereupon become the duty of the Attorney General to commence and prosecute in the proper Courts the necessary proceedings to cancel all patents*, certificates or other evidence of title heretofore issued for such grants and to restore the title thereof to the United States.

There is not a fact or word of evidence in this case to justify the suggestion of the learned counsel in the Court below that "these lands were certified for the Sioux City Company *by mistake*." It is true that the District Court of Minnesota, whose judgment was affirmed by the Supreme Court of the State, and by this Court held that the Winona Company had a paramount right to them. (Record, pages 46-47, subdivision 13.) But the question involved in this suit was not involved in that, and if that judgment is evidence in this

case for the purpose of establishing a fact not in issue, *a fortiori* it is evidence on the questions that were in issue and decided, viz: That the Winona & St. Peter Railroad Company *was the owner of and entitled to these lands.*

W. & St. P. R. R. Co. vs. *St. P. & S. C. R. R. Co.*, 26 Minn., 179.

Ib. 27 Minn., 128; 112 U. S., 720.

But this is not a fact admitting of question for it is a matter of record that there was a protracted contest in the Interior Department between those two railroad companies for these lands and the Secretary decided that the Sioux City Co. was entitled to them.

St. Paul R. R. Co. vs. *Winona Railroad*, 112 U. S., 724. Record herein, pages 46–47, subdivision 13.

And they being withing the indemnity limits of its grant and necessary to fill it (Record page 45, sub. 10 and 11), and all the preemption filings and homestead entries thereon having been cancelled they became public lands of the United States subject to be selected by the Sioux City Company for indemnity for the lands lost in its place limits.

Ryan vs. *Cent. Pac. R. Co.*, 9 Otto, 382-389.

Bardon vs. *N. P. R. Co.*, 145 U. S., 545.

We admit that the *Winona Company* could not under any construction of the statute at any time have taken these lands *as indemnity*, for the grants under which it claimed expressly provided that indemnity should be taken *outside* of the tiers of sections in its place limits: but not a word can be found in any of these grants giving any countenance to the contention that one company cannot select indemnity within the place limits of another *simply because the lands selected lie within such place limits*. Both reason and the authorities are to the contrary. The theory of all these land grants is that the United States reserve the alternate sections within the place limits of the grant, but beyond this (and the other special reservations made in these grants, none of which are applicable to this case) the right of any company to select indemnity from the public lands of the United States at any place within its indemnity limits, though that may be within the place limits of another company, is clear, and so are the authorities.

U. S. vs. *M. K. & T. Ry. Co.*, 141 U. S., 358.

St. P. M. & M. Ry. Co. vs. *Munz*, 17 Land Dec., 288.

Allers vs. *N. P. R. R. Co.*, 9 Land Dec., 452, 456.

N. P. R. R. Co. vs. *Moling*, 11 Land Dec., 138.

Letter of Secretary Noble, Record, page 343–344; Ib. 283, 284–5.

See also the language of the land grant acts referred to.

(b) Every tract of land involved in this suit, except those certified to the Sioux City Company, and with the exception of a few acres, those certified to that company also, are held and owned by bona fide purchasers for value, from the Railroad Co. or its grantees and their title is unimpeachable.

The language of section 2 of the Act of 1887, under which this suit is brought, shows that Congress understood that the certification of these lands to the State conveyed the legal title.

And the decisions of several Attorneys General and Secretaries of the Interior, called upon to consider the question, show clearly that in their opinion the legal title passed.

6 Land Dec., 272 *et seq.*: Ib. 276 *et seq.*: Ib. 544 *et seq.*: and other cases below cited. It is equally clear that Attorney General Miller, who drew this bill, so interpreted the law, for on that theory manifestly it is framed.

When these lands were certified to the State for the defendant railroad company either it or the alleged homestead and pre-emption claimants were entitled to them, or else they were public lands of the United States subject to be disposed of under the general laws. They had not been sold or (except for this defendant railroad company) reserved, or set apart for any special use. The

Land Department was a special tribunal, having exclusive jurisdiction to pass upon the facts and the rights of the different claimants, and to dispose of and patent the lands. This being so, we contend that its judgment or decision, whether right or wrong, and the patent issued accordingly —passed the legal title.

This is no new question in this Court.

Johnson vs. *Towsley*, 13 Wall. 72, *et seq.*.., was a suit brought *to compel a conveyance* to the complainants of a tract of land held by the defendant under a patent of the United States on the ground that the Secretary of the Interior erred in patenting it to the defendant and that the complainant had a prior and legal right thereto. The Courts of Nebraska held that the complainant was entitled to recover and the case was removed to this Court. Mr. Justice Miller, delivering the opinion of the Court, said:

> It will be seen by this short statement of the case that the rights asserted by complainant, and recognized and established by the Nebraska Courts, were the same which were passed upon by the Register and Receiver, by the Commissioner, and by the Secretary of the Interior, and we are met at the threshold of this investigation with the proposition that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties

not only in the Land Department, but in the Courts and everywhere else.

This proposition is not a new one in this Court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and the question being pressed upon our attention with an earnestness and fullness of argument which it has not, perhaps, before received, and with reference to statutes not heretofore considered by the Court, we deem the occasion an appropriate one to re-examine the whole subject. * * * But while we find no support to the proposition of the counsel for plaintiffs in error in the special provision of the statutes relied on, it is not to be denied that the argument is much stronger when founded on the *general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public land, subject to sale by preemption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all Courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the Court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained.* * * * It is said, however, that the present case does not come within any of the adjudicated cases

> on this subject: that in all of them there has been some element of fraud or mistake on which the cases rest. Undoubtedly, there has been in all of them some special ground for the exercise of the equitable jurisdiction, for *this Court does not and never has asserted that all the matters passed upon by the Land Office are open to review in the Courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud or imposition or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department.* But we are not prepared to concede that when in the application of the facts as found by them they, by misconstruction of the law, *take from a party that to which he has acquired a legal right under the sanction of those laws,* the Courts are without power to give any relief.

This Court affirmed the judgment of the State Courts.

St. Louis Smelting Co. vs. *Kemp*, 14 Otto, 636, involved the question whether a patent for lands issued by the United States is conclusive *in an action at law* of the legal title. Delivering the opinion of the Court, Mr. Justice Field said:

> In the course of their duty, the officers of that [Land] department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility

and weight. *In that respect they exercise a judicial function and, therefore, it has been held in various instances by this Court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.. * * * Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case*

> *where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale.* * * * These views are not new in this Court; they have been, either in express terms or in substance, affirmed in repeated instances.

And after referring to *Polk's Lessees* vs. *Wendal* and *Patterson* vs. *Winn*, the learned Judge added:

> The doctrine declared in these cases as to the presumptions attending a patent, has been uniformly followed by this Court. * * * So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a Court of law. *This exception is subject to the qualification, that when the authority depends upon the existence of particular facts or upon the performance of certain antecedent acts, and it is the duty of the Land Department, to ascertain whether the facts exist or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision.* * * *The general doctrine declared may be stated in a different form, thus: A patent in a Court of law is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that Court the patent*

*is unassailable for mere errors of judgment. * * * On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. * * ** According to the doctrine thus expressed and the cases cited in its support, and there are none in conflict with it, there can be no doubt that the Court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. *If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence or acted from imperfect views of their duty, or even from corrupt motives, a Court of law can afford no remedy to a party alleging that he is thereby aggrieved.*

In *Steele* vs. *Smelting Co.*, 106 U. S., 447, the question was whether a patent for such a portion of the public domain as is by law subject to sale or other disposal passes the title thereto, and whether the findings of fact by the Land Department in such case were, whether right or wrong in fact, conclusive in a Court of law. Mr. Justice Field, delivering the opinion of this Court, said:

We have so often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. *Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this Court in repeated decisions.* In *Quinby* vs. *Conlan*, decided at the last term, we said: "It would lead to endless litigation and be fruitful of evil, if a supervisory power were vested in the Courts over the action of the numerous officers of the Land Department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to

them, or where misrepresentations and fraud have been practiced necessarily affecting their judgment, that the Courts can, *in a proper proceeding*, interfere and refuse to give effect to their action. On this subject we have repeatedly, and with emphasis, expressed our opinion and the matter should be deemed settled." * * * It need hardly be said that we are here speaking of a patent issued in a case where the Land Department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action. In that respect the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale. * * * *So, with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a Court of equity if he possess such an equitable right to the premises as would give him the title if the patent were out of the way.* * * * *In any event, whether the officers of the Government have been misled by the*

testimony produced before them or not, the conclusions reached by them are not to be submitted for consideration to every jury before which the patent may be offered in evidence on the trial of an action. As we said in the case of *Smelting Co.* vs. *Kemp*: "*It is this unassailable character (of the patent) which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces.*"

Where ejectment is founded upon either of these instruments—the patent of the government or the deed of an individual—the question being which of the parties has the legal title, it is irrelevant to introduce evidence to show that one of them ought to have had it and might be able to get it by the proceeding in some other tribunal or in some other form of action.

In *Chandler* vs. *Calumet Co.*, 149 U. S., 79, the question was whether the land in controversy was covered by the swamp land grant or by a grant to the State in aid of a ship canal, and whether the act of the Secretary of the Interior and the officers of the State operated as a conclusive adjudication of the question, and the Court decided the last question in the affirmative. Mr. Justice Jackson, delivering the opinion of the Court, after referring to the cases of *French* vs. *Fyan*, *Ehrhardt* vs. *Hogaboom*, and *Wright* vs. *Roseberry*, used the following language:

Under the principle announced in that case (*Wright* vs. *Roseberry*), and under the

foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which pass to the State by the swamp land grant, and that the selection by the State of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the department to the State that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. *The exclusion of the land in dispute from the swamp lands, selected and patented to the State, and its inclusion in the selection of the State as land coming within the grant of 1852, with the approval of such selection by the Interior Department and the certification thereof to the State operated to pass the title thereto as completely as could have been done by formal patent; and being followed by the State's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law.*

In *United States* vs. *Schurz*, 12 Otto. 378, a petition was filed in the District Court of the District of Columbia for a writ of *mandamus* to compel the defendant—the Secretary of the

Interior—to deliver to the relator a patent for a quarter section of the public lands. The relator, McBride, claimed it under the homestead law. It lay within the incorporated city of Gainsville and the relator's entry was not made at the Land Office until after the town was incorporated—though he settled on it before. A patent therefor to the relator had been executed by the Secretary and recorded but not delivered to him. Counsel for defendant contended before this Court, among other things: (1) That the execution of the patent concluded nothing. (2) That the land lying within the limits of an incorporated city was not subject to homestead entry, and therefore the patent was void. In considering these questions, Mr. Justice Miller, delivering the opinion of the Court, said:

> It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.
>
> We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, are confided, as we have already said, the administration of the laws concerning the sale of the public lands. The land in the present case had been surveyed, and the lands in that district generally had been open to pre-emption, to homestead entry and to sale, under their control. *The question whether any particular piece of land belonging to the Government, was open to sale, to pre-emption or to homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question is judicial in its character, as also the decision of conflicting claims to the same land by different parties.*

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade, up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. How can it be said that when their decision of such a question is finally made and recorded in the shape of a patent, that instrument is absolutely void for such errors as these? If a patent should issue for land in the State of

> *Massachusetts, where the Government never had land, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held posession, it might be held void in a Court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.*

Noble vs. *Union River Logging Co.*, 147 U.S., 165, is an instructive case. The United States by the act of March 3, 1875, granted the right of way through the public lands to any railroad company that should file with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization: and further provided:

> That any railroad company desiring to secure the benefits of this act shall within twelve months after the location of any section of twenty miles of its road * * * file with the Register of the United States Land Office for the district where such land is located a profile of its road; and upon approval thereof by the

> Secretary of the Interior the same shall be noted upon the plats and thereafter all such lands over which the right of way shall pass shall be disposed of subject to such right of way.

The Union River Logging Company filed a profile of its line and it was approved by Secretary Vilas. Afterward Secretary Noble made an order annulling and cancelling the map and profile and directing the Commissioner of the General Land Office to carry out the order on the ground that the logging company was not engaged in the business of a common carrier of freight and passengers, but in the transportation of logs for the private use and benefit of its several stockholders, and therefore was not a railroad company within the purview of that act. The logging company thereupon filed its bill in equity to enjoin the Secretary from executing that order. The Court below granted the injunction and the case was removed to this Court. Mr. Justice Brown, delivering the opinion of this Court, after reviewing many cases, said:

> The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the Secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff,

and that it was competent for his successor to revoke the approval thus obtained. In other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action. The seizure and possession of the *res* within the bailiwick in a proceeding *in rem*; a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged. So, if the Court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, or condemns as lawful prize a vessel that was never captured, or a court-martial proceeds and sentences a person not in the military or naval service, *or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the Court or officer fails for want of jurisdiction over the person or subject matter.* The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed *quasi* jurisdictional,

which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the Court, cannot be attacked collaterally. With respect to these facts, the findings of the Courts are as conclusively presumed to be correct as its findings with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal Court, which, when found by such Court, cannot be questioned collaterally; the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy; the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate; the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors, and others of a kindred nature, *where the want of jurisdiction does not go to the subject matter or the parties, but to a preliminary fact necessary to be proven to authorize the Court to act.*

In this class of cases, if the allegation be properly made, and the jurisdiction be found by the Court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its findings can only be impeached in a proceeding instituted directly for that purpose.

This distinction has been taken in a large

number of cases in this Court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent.

See this case at length.

In *Knight* vs. *U. S. Land Association*, 142 U. S. 161, the plaintiff below—the land association—began suit against Knight to recover a block of land in the city of San Francisco, California. The plaintiff contended that the premises were below the line of ordinary high water mark at the date of the conquest of California from Mexico, and therefore upon the admission of the State into the Union in 1850, enured to it by virtue of its sovereignty. If this were not true, they were acquired by and belonged to the United States. The Land Association claimed under and had acquired the right and title of the State. Knight had acquired all the title and interest of the United States. One question in the case, therefore, was whether the premises sued for were below the line of ordinary high water mark. The plaintiff, on the trial in the Court below, offered evidence tending to show, contrary to the line established under the direction of the Secretary of the Interior, that the premises were below the ordinary high water mark. To that evidence the defendant objected as in-

competent. The Court overruled the objection and received the evidence and gave judgment for the plaintiff. The case having been moved into this Court, Mr. Justice Field, delivering a concurring opinion, used this language:

> The Court below having assumed that another line than the one officially established was the true one, took the extraordinary ground that the error committed in that respect by the surveying officers, though acting under the express direction of the Land Department, was jurisdictional and fatal to their action, rendering it void, and opening the patent embodying the survey to collateral attack. And it proceeded to cite several decisions in supposed support of this view, but which only were to the effect that where the Land Department had no jurisdiction over the subject matter considered, its patent could be assailed collaterally.
>
> *In thus holding, the Court failed to distinguish between what was, upon its own statement mere error in the action of the Land Department, and matters which were entirely beyond its jurisdiction.* * * * *The distinction between errors committed where jurisdiction exists to take the proceeding in which the alleged error arises, and where there is an entire want of jurisdiction over the subject matter considered, is too familiar to be discussed.* The distinction is constantly applied with reference to the proceedings of ordinary tribunals. If they have jurisdiction of the subject matter and the parties, their judgment cannot be collaterally assailed for mere errors committed in

the proceedings leading to it. The remedy for such errors must be sought by application for a new trial or by appeal for a review to an Appellate Court. The same distinction prevails with reference to the proceedings the special tribunal or department of the government to which is entrusted the supervision of measures for the issue of its patent.

The cases referred to and dwelt upon as supposed to support the opposite doctrines are not susceptible of the meaning attributed to them. The principal cases cited are *Smelting Co.* vs. *Kemp*, 104 U. S., 636, 641; *Wright* vs. *Roseberry*, 121 U. S., 488, and *Doolan* vs. *Carr*, 125 U. S., 618. *They assert no new doctrine, but law, which has always existed and been recognized, though seldom more misapplied than here. That the United States cannot convey by patent what it never owned, or has already parted with, no matter with what formality the instrument is issued, is a self-evident proposition. The Government in that respect is under the same limitations as an individual. That is the only purport, so far as the point raised here is concerned of the decision in Wright* vs. *Roseberry*, where a patent of the United States for land claimed under the pre-emption laws was defeated by showing that the premises in controversy were swamp and overflowed land previously conveyed to the State.

See also to the same effect:

U. S. vs. *Miner*, 114 U. S., 233–243–4.

Lee vs. *Johnson*, 116 U. S., 48.

Hardin vs. *Jordan*, 140 U. S., 371. 400-401.

Investment Co. vs. *Davis*, 40 Minn., 455–458.

W. & St. P. Land Co. vs. *Ebilcisor*, 52 Minn., 312.

Crapo vs. *Town of Troy*, 98 Mich., 806.

U. S. vs. *W. & St. P. R. Co.*, 67 Fed. R., 948, this case.

Curtner vs. *U. S.*, 149 U. S., 662.

Wright vs. *Roseberry*, 121 U. S., 488, 509, 519–520.

Davis Admrs. vs. *Wiebold*, 139 U. S., 507, 529–530.

McCormick vs. *Hays*, 159 U. S., 332.

Prindeville vs. *Ry. Co.*, 10 Land Dec., 575–6.

Wisconsin Cent. Ry. Co. vs. *Stinka*, 4 Land Dec., 344–345.

N. P. R. R. Co. vs. *Fitzgerald*, 7 Land Dec., 228.

N. P. R. R. Co. vs. *Potter*, 11 Land Dec., 531.

The only doctrine deducible from the cases or that is consistent with well settled legal principles may be thus stated in the language of this Court:

> *The action of the Land Office in issuing a patent for any of the public lands subject to sale by pre-emption or otherwise is conclusive of the legal title—the existence of lands subject to be patented being the only necessary prerequisite to a valid patent.*

All the authorities relied on in support of a contrary view resolve themselves into this: That when the Land Department has issued a patent for lands that do not belong to the United States or that have been reserved from sale and thus withdrawn from the jurisdiction of the Land Department, the patent is void for want of jurisdiction over the subject matter. In that respect the Land Department is under the same limitation as an individual, and

> *When the authority (of the Land Department to patent the lands) depends upon the existence of particular facts or upon the performance of certain antecedant acts, and it is the duty of the Land Department to ascertain whether the facts exist or the acts had been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision.*

If we are right in this contention, the legal title passed by the certification, whether the certification was right or wrong, and the deeds made by the defendant railroad company and its grantees to *bona fide* purchasers are unimpeachable.

It certainly cannot with reason be argued that the Secretary has the power or jurisdiction to act if he makes a right decision, and no power or jurisdiction if he makes a wrong one.

(c) *It is not open to question but that if the legal title did pass, a bona fide purchaser from the railroad company acquired not only the legal but the equitable title unimpeachable by the United States or anyone claiming under them.*

Col. Coal Co. vs. *U. S.*, 123 U. S., 307, 313, 314.

U. S. vs. *Minor*, 29 Fed., 134, 136; Ib., 114 U. S., 233, 239, 243.

U. S. vs. *Cal. & Land Co.*, 49 Fed., 496, 498.

U. S. vs. *Des Moines & Co.*, 142 U. S., 510, 524, 530, 531.

U. S. vs. *Dalles Mil. Co.*, 140 U. S., 599, 617.

U. S. vs. *Cal. Land Co.*, 148 U. S., 31, 40, 41, 42, 45 *et seq.*

2 Pom. Eq. Jur., 2 Ed., Sec. 776, 777, 871, 918, and cases cited in notes.

1 Story's Eq., 13 Ed., page 415–417, Sec. 409–411.

Ib., page 436, Sec. 434; Ib. 438, Sec. 436.

That these grantees of the railroad company are *bona fide* purchasers, see

Testimony of Brown, Record, pages 94–95, 100, 105–106.

Testimony of Lamberton, pages 118–119–120, 126, 353–354.

Testimony of Simmons, pages 107 to 111, inclusive.

subject, however, at all times to the inquiry whether such officers had the legal authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject matter of the patent, not merely voidable.

Nor does the case of *Weeks* vs. *Bridgman*, 159 U. S. 541, declare a contrary doctrine. Before the tract of land referred to in that case was certified to the State for the railroad company, Brott had acquired the equitable title to it, under the act of March 3, 1855. Having complied with the requirements of that law, he was entitled to a patent when, in August, 1857, he claimed the right, and offered to pre-empt it. The right to a patent is, in equity, equivalent to a patent. And, irrespective of what he had before done, and the rights that he had before acquired, he had, under the act of Congress, of May, 1860, the right to pre-empt that tract, and he never abandoned his claim or waived his right. Therefore, when the Land Department in 1864 assumed to certify that land to the State for the railroad company, it was not public land of the United States, subject to disposal as a part of the public domain. It in equity belonged to Brott, and the Land

Department was without jurisdiction over the subject matter.

Noble vs. *Union River Logging Rld. Co.*, 147 U. S., 165, 174.

There is nothing in *Stone* vs. *U. S.*, *Maxwell Land Grant Case*, *Wright* vs. *Roseberry*, or *U. S.* vs. *San Jacinto Co.*, cited by the learned counsel for the complainants, inconsistent with the doctrine by us contended for. Nor are *Hastings & Dak. R. Co.* vs. *Whitney* (34 Minn., 539, and 132 U. S., 345), *Whitney* vs. *Taylor*, (158 U. S., 185), and *K. P. R. Co.* vs. *Dunmeyer* (134 U. S., 629), in point. The question here discussed did not arise in any of those cases. The land in question in each of them had been neither certified nor patented to the railroad company, but, on the contrary, was patented to the adverse claimant. So, of course, the question whether a patent to the railroad company would have conveyed the legal title could not arise, and therefore was not considered or decided. Nor was any such question involved in *Burr* vs. *Greely*, 10 U. S. App., 409, which was a suit brought to recover for a breach of a covenant of warranty. To recover on such a covenant it was necessary to aver and prove eviction, and the Court held, and the fact was, that there was no eviction.

Nor does Burfenning's case, 163 U. S., 321,

Ib. 46 Minn., 20, support the contention that the certification of these lands by the Land Department was absolutely void.

In that case there was no pretence or semblance of claim on the part of the patentee until two years after the organization of the city, and the tract in question was conceded to be, and to have been when the claim of the patentee was initiated, within the corporate limits of the city. It was, therefore, as much reserved from pre-emption entry or homestead settlement as it would have been if within a military or Indian reservation. The Land Department, under the circumstances, had no jurisdiction over the subject matter. We do not contend that the Land Department could convey land that the United States had already disposed of, or that was expressly reserved or set apart to any particular use. That case is clearly distinguishable from this. Though the Minnesota Supreme Court held that the patent in that case was void, it most unequivocally held that the certification of the Land Department conveyed the legal title to these very lands.

Investment Co. vs. *Davis*, 40 Minn., 455, 458.

W. & St. P. Land Co. vs. *Ebbeisor*, 52 Minn., 312.

And the opinion of this Court does not justify the conclusion that it was intended to re-

cede from or question or qualify the doctrine of the cases by us above cited. The language and decision of this Court must be construed with reference to the peculiar facts of the case.

No other rule than that for which we contend would be tolerable in practice. The statute of limitations does not run against the United States, nor could they be made defendants in a suit to quiet title. Therefore, unless the patent or certification of the land in such cases is unassailable in an action at law—passes the legal title—as said by Mr. Justice Field, delivering the opinion of this Court in *St. Louis Co.* vs. *Kemp*, supra,

> Instead of being a means of peace and security, it would subject his (the grantee's) rights to constant and ruinous litigation. It is this unassailable character that gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces.

It is often said that as to lands within the primary limits of a grant the title passes by the grant and not by the act of the Land Department in certifying or patenting them; and therefore that the adjudication or decision of the Land Department does not at all affect the title. This proposition thus broadly stated cannot be accepted unqualifiedly. The lines of railroads rarely run on the line of a section or sub-division of a section, or parallel with

such lines, and as such grants are of "*every alternate section of land designated by odd numbers for six (or ten) sections in width on each side of the road*," and the Land Department only conveys by Government sub-divisions, the beneficiary of the grant never receives all of the lands in the alternate sections within the external lines of the grant and always does secure lands outside of those limits. To give effect to the manifest intention of Congress that the donee should have, subject to certain expressed limitations and exceptions, six (or ten) sections per mile, it was necessary for the Land Department to adopt some rule not found in the statute, in administering such grants, and to determine what tracts, in part, but not wholly, within the granted limits should be conveyed.

Accordingly a rule was adopted and has been uniformly followed, in administering all of these grants, that when, and only when, the greater part of a government sub-division is within the granted limits, that sub-division is held to fall within the grant, and the lands are patented accordingly. This is an equitable and proper rule, *but it is not the statute.*

It is also the rule, when an undivided moiety of a tract within the place limits is not covered by the grant but remains in the United States, that a patent is not made to the railroad company of an undivided moiety but of an equivalent number of acres. And it is well

understood that a section is not always—is, perhaps, rarely—just 320 rods long, or even the length indicated by the field notes or on the government plats. The variation is often very considerable, and, of course, there is a corresponding variation in the length of the lines sub-dividing the section. Therefore, as the Land Department in fixing the external limits of the grant, and the railroad company in indicating on its map the point of intersection of the government lines, refer to and rely on the government plats, the exact number of acres of the tract cut by the external lines of the grant that lie within or without those lines, is rarely correctly arrived at, and therefore a tract or sub-division which is cut by the external limits of the grant may be, and doubtless often is, conveyed to the railroad company though the greater part of it lies without those limits, and *vice versa*. And every one familiar with the adjustment and administration of such grants knows and the reports of this Court show that frequently the "line of road" varies miles from the line indicated on the map, or plats—and the lands are certified or patented in accordance with the plat. If, therefore, it is competent to go back of the patent or certification and to rely solely on the grant to ascertain what lands were granted, many titles supposed to be valid would be overthrown.

VII.

IN THE ADMINISTRATION OF THE PUBLIC LAND SYSTEM OF THE UNITED STATES, QUESTIONS OF FACT ARE FOR THE CONSIDERATION AND JUDGMENT OF THE LAND DEPARTMENT, AND ITS JUDGMENT THEREON IS FINAL.

Burfening vs. *Ry. Co.*, 163 U. S., 323 and other cases above cited.

Lee vs. *Johnson*, 116 U. S., 48–50.

When this grant was made to the defendant railroad company, the Land Department had exclusive jurisdiction to determine whether these lands fell within that grant or properly belonged to any other claimant, or were public lands of the United States, and to dispose of them accordingly. The proper decision of those questions depended on certain facts, which it was necessary for them to find. For instance, if these lands were withdrawn for the railroad grant, the alleged filings and entries subsequently made were void. *Riley* vs. *Wells*, 154 U. S., 578; *Spencer* vs. *McDougal*, 159 U. S., 64. Or if those filings or entries were fictitious—there being no such persons as those named—they were void, and in either case did not except the land from the grant. Such withdrawals are ordinarily (we believe always) indicated by a mere pencil entry—"withdrawn"—on the map;

but if the Land Department had ordered a withdrawal to the knowledge of the person making a subsequent pre-emption filing or homestead entry, such entry or filing, we respectfully submit, would be invalid as against the grant. Many other illustrations might be given.

It was for the Land Department, before it certified these lands to the State for the railroad company, to ascertain all the facts that might affect the rights of the claimants, and that should control its action in patenting the lands, and, as has been seen, the presumption is that it did so, and that the lands were legally patented, and the complainants have not overcome this presumption. *But whether the conclusions at which it arrived were or were not justified by the evidence, its decision was conclusive and not open to re-litigation in the Courts, in the absence of anything giving a Court of equity jurisdiction to review it.*

If it were claimed that that decision was influenced by fraud or imposition or otherwise so as to give a Court of equity jurisdiction, it was incumbent on the complainant to allege and conclusively prove such matters, but it is not even pretended, much less proven, that any of the defendants is chargeable with fraud, imposition or unfair dealing of any kind in the premises. We therefore contend that the decision and patent of the Land Department are conclusive in favor of the right and title of

the railroad company and its grantees, and that the question is not open to re-litigation in the Courts.

VIII.

THE UNITED STATES ARE ESTOPPED TO QUESTION THE RIGHT OR TITLE OF THE DEFENDANT RAILROAD COMPANY OR ITS GRANTEES.

We again ask attention to the facts that are either admitted or proven, or of which this Court will take notice:

None of the alleged homestead or pre-emption claimants are making any claim to any of these lands. If there was any error in certifying them, it was solely the error of the officers of the United States. The construction of the law complained of, and which is the sole ground alleged as the justification for this action, was applied in the adjustment and administering of the very earliest land grants, and thereafter, for many years, numerous grants were made by the Congress in the very same, or substantially the same, language, and during all that time, and for about a quarter of a century, that construction was adhered to without question or doubt as to its correctness.

The error of the Land Department—if an error—complained of did not prejudice the complainants or add one acre of land to the grant of this defendant railroad company. If

the law had then been construed as it is now, the evidence justifies the belief that the railroad company would have acquired these identical lands, but even if it failed to get these, it was entitled to and could have gotten an equal number of acres of indemnity lands which the United States have since appropriated and disposed of, and there remain now no lands within the limits of its grant from which such indemnity could be obtained. There is not a scintilla of evidence tending to show bad faith or misconduct on the part of any of the defendants in the premises.

Nearly a generation has gone since the transaction that it is sought by this suit to invalidate. Most of those who had knowledge of the circumstances that might have an important bearing on the rights of the parties and the legality of the acts complained of have gone, and those who remain undoubtedly have forgotten all or many of the facts and circumstances. Most of the land offices in which these matters were transacted have been either consolidated with other offices or abolished. The land officers were generally men of neither business nor professional training, and were changed with each administration. Therefore, such memoranda, files and records as they made or kept were informal, and after the lands were certified to the State doubtless considered of no further value, and have in all probability been lost or destroyed.

During many of the years since these lands were certified to the State, litigation concerning the title or right to them has been carried on in both the State and Federal Courts, but in only one instance and as to one subdivision was the legality of the certification to the State for this defendant railroad company questioned, and in that case the very question here involved was decided against that claimant and the title of the railroad company adjudged valid by one of the ablest Federal Courts in the country.

We therefore respectfully submit that this suit cannot be maintained under such circumstances, and after such a lapse of time, no possible or pretended excuse being shown for the delay. It needs no argument or illustration to show that this defendant railroad company is thus put at a great and unfair disadvantage without fault on its part. Under such circumstances the rule is clear and well settled that a Court of equity will not interfere. If this was a suit between private parties, it cannot be doubted but that the Court would dismiss the bill for want of equity. That he who seeks equity must do equity—that he who comes unto a Court of equity must come with clean hands —that nothing can call forth a Court of equity into activity but conscience, good faith and reasonable dilligence, are universal rules or maxims "guiding and regulating the action

of equity Courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief." 1 Pomery's Eq. (2d Ed.) See 385 Ib., section 397 *et seq;* Ib., section 418.

> This principle, "That he who seeks equity must do equity," may be applied in fact in every kind of litigation and to every species of remedy. The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, this Court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowleged or conceded, or will admit and provide for all eqitable rights, claims and demands justly belonging to the adverse party and growing out of or necessarily involved in the subject matter of the controversy. It says, in effect, that the Court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit. This meaning of the principle was more definitely expressed by an eminent judge in the following language: "The Court of equity refuses its aid to give to the plaintiff what the law would give him if the Courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of

> the condition should be one which the Court would not otherwise enforce." In this narrow and particular sense the principle becomes a universal rule governing the Courts of equity in administering all kinds of equitable relief in any controversy where its application may be necessary to work out complete justice.

1st Pom. Eq. Jur., 2d Ed., Sec. 385.

See also 1 Story's Eq. Jur., 13th Ed., Sec. 64e and notes.

> The rule being that he who seeks equity must do equity in matters arising out of the transaction in respect of which he seeks relief, a Court will not rescind a transaction unless the party against whom the relief is sought can be remitted to the position in which he stood antecedently to or at the time of the transaction.

Kerr on Fraud and Mistake, 334–336; Ib., 328–329.

U. S. vs. *Cent. Pac. R. Co.*, 26 Fed., 479, 483.

> Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation of suits in this Court. *The law of laches, like the principle of the limitation of actions, was dictated by experience and founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence and*

other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. The departure from it would open an inlet to the evils intended to be excluded.

Brown vs. *Buena Vista*, 95 U. S., 157, 160.

A chancellor refuses to interfere after an unreasonable time from the considerations of public policy and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost.

Wilson vs. *Anthony*, 19 Ark., 16.

See also:

Great Luxemburg R. R. vs. *Sir William Magna*, 25 Beavan, 586.

Clark vs. *Dixon*, E. B. & E., 148.

U. S. vs. *Williamette*, 54 Fed., 807, 811–812.

Gallagher vs. *Cadwell*, 145 U. S. 368.

U. S. vs. *San Jacinto Co.*, 125 U. S., 285.

And when the United States come into a Court of Equity for relief, they are, like any other party, governed by the fundamental rules of equity. The obligations of legal morality rest with as much weight upon them as upon private individuals.

State vs. *Milk*, 11 Fed. Rep., 389, 397.

U. S. vs. *Beeby*, 17 Fed., 36, and cases there cited.

Lake Sup. Ship Canal Co. vs. *Cunningham*, 44 Fed., 819, 842–3, and cases there cited.

U. S. vs. *Ignati*, 48 Fed., 251, 253, and cases there cited.

The Siren vs. *U. S.*, 7 Wall., 152, 159.

Pengra vs. *Munz*, 29 Fed. R., 830, 836.

Brent vs. *Bank of Washington*, 10 Peters, 615.

Sullivan vs. *Ry. Co.*, 94 U. S., 811.

Stone vs. *U. S.*, 2 Wal., 525, 527–528.

Wilson vs. *Anthony*, 19 Ark., 16.

Hough vs. *Buchanan*, 27 Fed., 328, 331–2.

Brown vs. *Buena Vista*, 95 U. S., 157, 160.

U. S. vs. *San Jacinto Tin Co.*, 125 U. S., 273, 284–286.

We do not contend that, as a rule, the United States are barred by the mere laches of their officers, but when, on account of such laches, a defendant in a suit brought by the United States is placed at a disadvantage in making his defense, either by the loss of evidence or otherwise, the question then is not one of mere laches. The chancellor refuses under such circumstances to interfere from considerations of public policy and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost.

Gallagher vs. *Cadwell*, 145 U. S., 368-372.

> The cases all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.

Gallagher vs. *Cadwell*, 145 U. S., 368, 372-373.

> "If," as said by Mr. Justice Miller, delivering the opinion of this Court, "*the doctrine that the United States in bringing such actions is not controlled by any statute of limitations or governed by the rule concerning laches, * * * then the evil which may result would seem to be endless as well as enormous.*"

U. S. vs. *San Jacinto Co.*, 125 U. S., 273, 284.

U. S. vs. Flint, 4 Sawyer, 58, 59

IX.

THE UNITED STATES HAVE NOT SUCH AN INTEREST IN THE SUBJECT MATTER AS TO AUTHORIZE THEM THEM TO MAINTAIN THIS SUIT.

U. S. vs. *Minor*, 114 U. S., 233, 244.

U. S. vs. *San Jacinto*, 125 U. S., 273, 284-6.

They cannot be gainers directly or indirectly to the amount of one farthing by a judgment

against these defendants. Therefore, even if they might maintain this suit, the doctrine of laches and the statute of limitations are applicable, and, in view of these facts, conclusive.

Curtner vs. *U. S.*, 149 U. S., 662, 670, 671, *et seq.*;

Hardt vs. *Heidweger*, 152 U. S., 547, 558, *et seq.*

Gallagher vs. *Cadwell*, 145 U. S., 368.

THOMAS WILSON,

Solicitor for the defendants, the Winona & St. Peter Railway Company and the Minnesota Land and Investment Company.

165-463

Office Supreme Court, U. S.
FILED
OCT 17 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

United States of America.

321.

OCTOBER TERM, 1896.

THE UNITED STATES OF AMERICA,
~~Plaintiff in Error~~ Appellant,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, THE WINONA AND ST. PETER LAND COMPANY, *et al*,

~~*Defendants in Error.*~~

BRIEF

On behalf of the The Winona and St. Peter Land Company, et al.

J. A. TAWNEY and
H. M. LAMBERTON,
Solicitors for ~~Defendants in error,~~
The Winona and St. Peter Land Company, et al.

LEADER PRINT, WINONA.

against these defendants. Therefore, even if they might maintain this suit, the doctrine of laches and the statute of limitations are applicable, and, in view of these facts, conclusive.

Curtner vs. *U. S.*, 149 U. S., 662, 670, 671, *et seq.*:

Hardt vs. *Heidweger*, 152 U. S., 547, 558, *et seq.*

Gallagher vs. *Cadwell*, 145 U. S., 368.

THOMAS WILSON,

Solicitor for the defendants, the Winona & St. Peter Railway Company and the Minnesota Land and Investment Company.

165-463

Office Supreme Court, U. S.
FILED
OCT 17 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

United States of America.

321.

OCTOBER TERM, 1896.

THE UNITED STATES OF AMERICA,
~~*Plaintiff in Error,*~~

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, THE WINONA AND ST. PETER LAND COMPANY, *et al*,
~~*Defendants in Error.*~~

BRIEF

On behalf of the The Winona and St. Peter Land Company, et al.

J. A. TAWNEY and
H. M. LAMBERTON,
Solicitors for ~~Defendants in error,~~
The Winona and St. Peter Land Company, et al.

LEADER PRINT, WINONA.

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1896.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, THE WINONA & ST. PETER LAND COMPANY, THE MINNESOTA LAND AND INVESTMENT COMPANY. *et al,*

Defendants in Error.

BRIEF ON BEHALF OF THE WINONA AND ST. PETER LAND COMPANY AND FOURTEEN OTHER DEFENDANTS IN ERROR.

In this action the Winona and St. Peter Land Company occupies the position of an innocent *bona fide* purchaser of a large quantity of the land in question, the certification of which to the state for the benefit of the Winona & St. Peter Railroad Company, the immediate grantor of the Land Company, the gov-

erment now seeks to cancel. In addition to having paid a valuable consideration for the land, the Land Company has in turn conveyed a large proportion of such lands to *bona fide* purchasers for value, and it has assumed in such transfers all the obligations incident to the usual covenants of warranty in deeds of conveyance. All these acts have been done by the Land Company in perfect good faith and without notice or knowledge that the goverment had or claimed any adverse title or interest in the land.

The record in this case clearly establishes these facts, but notwithstanding their existence, the goverment now seeks, after the lapse of a quarter of a century, to destroy or invalidate its own patents, made voluntarily and without fraud and upon which these defendants have relied in the sale and purchase of their land.

In the passage of the Adjustment Act of 1887, and in ordering these suits for the cancellation of the defendants' patents or certificates of title to the lands in question, Congress may be seeking to test the validity of the certificates by which that title was originally conveyed, and ultimately secure the land for the benefit of the original entryman. If such was the express object of the act and the avowed purpose of this suit there could be no doubt but that the doctrine of laches could be successfully invoked and a perfect defense maintained upon this ground alone, for the

reason that the United States would have no interest in the subject matter or result of the controversy and would be barred from asserting a state claim as is being attempted, the same as would an individual.

U. S. vs. Beebe. 127 U. S, 342.

But irrespective of the fact of whether the United States is the real party in interest or is merely a nominal party seeking to secure the land for the original entryman, the carrying out of that intention through the judiciary cannot be had, if at the threshhold of the case it is found that upon the faith of the certificates conveying the land individual rights have been acquired, in good faith and for value, which are superior to the claims set up by the United States.

AS TO WHETHER THE CERTIFICATES BY WHICH THESE LANDS WERE CONVEYED, THOUGH ERRONEOUSLY ISSUED, ARE VOID OR VOIDABLE.

In the discussion of this proposition it becomes necessary for us at the outset to inquire into the legal effect of the action of the officers of the Land Department in certifying to the State of Minnesota, for the benefit of the Winona and St. Peter Railroad Company, the lands within the place limits of its grant on which homestead entries or pre-emption filings which had subsequently been canceled existed at the time of the definite location of its road.

It is clamed by counsel for the plaintiff in error that such certificate was absolutely void and that no title has ever psssed from the United States to any one, even though the lands so certified are now in the possession of *bona fide* purchasers for value.

On the part of the defendents in error, the Winona and St. Peter Land Company and others, we maintain, in connection with and in addition to the defense of the Winona and St. Peter Railroad Company, which we adopt, that the certification of these lands to the state, even though erroneous, (which we do not concede) is merely voidable at the suit in equity of the party who has the better right to the title, and that the certificates issued by the proper officers of the Land Department conveyed the legal title to the state and its grantees.

In support of the position of the plaintiffs in error counsel for the government cities the following cases:

Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 641.

Burr v. Greeley, 52 Fed. Rep. 926.

These cases, however, do not establish counsel's contention that the certification in this case is absolutely void, as the question was neither argued nor considered in the above cases, nor was its determination material to the decision.

The field of discussion and argument is therefore

entirely open and unhampered by any decisions adverse to the position of defendants in error that the certification, if erroneous, is merely voidable.

The question to be determined at the threshold of this case is, were the certificates of the officers of the Land Department absolutely void so that they conveyed no title, legal or equitable, and so that they were constantly open to collateral attack? All the lands certified for the Winona Railroad Company were situated within the place limits of its grants. The grants were in the nature of a float which attached as soon as the map of the definite location of the line of road opposite the land was properly filed. The certificates of the officers of the Land Department were evidence that they had adjudged the grants to the Railroad Company had attached to the lands in dispute, and the legal effect of issuing such certificates was the same as though patents to such land had been issued to the railroad company.

In determining whether these certificates, if erroneously issued, were void or voidable, it becomes necessary for us to ascertain whether it was within the jurisdiction of the Land Department to determine whether these lands fell within the grant to the railroad company and belonged to it, or whether they were excepted from the grant by reason of homestead entries, pre-emptions or other filings thereon. If jurisdiction to determine these questions rested in the first

instance in the Land Department, and that department has adjudged that the grant to the railroad company attached to the lands in controversy, then there can be no doubt but that the certificates conveying these lands to the state for the benefit of the railroad company, though erroneous, are merely voidable and not void; and if voidable only then the rights of all *bona fide* purchasers whose rights have become vested in reliance upon such certificates before the government gave any notice of an alleged mistake of its officers or of its claim to recover the land, would be paramount and superior in equity to any claim which the government can now assert.

A glance at the powers and duties of the United States Land Department must convince us that its act in adjudging the lands in controversy to fall within the limits of the grant to the Winona Railroad Company and the certifying of the same to the state for the benefit of such company was within the strict jurisdiction of such department.

The act of March 3, 1849, (9 Stat. Ch. 108, Sec. 3, page 395; Sec. 441 Rev. Stat.) vests in the Secretary of the Interior the supervision of the public business of the United States relating to its public lands, and by the act of March 3rd, 1857, (11 Stat. Ch. 99, P. 195) as amended by the act of May 12th, 1864, (13 Stat. P. 72) the power was conferred and the duty imposed

upon him to indicate the land granted to the Winona Railroad Company by the above acts in all cases.

By the act of July 4, 1836, (5 Stat. Ch. 352, Sec. 1) the Commissioner of the General Land office is required to " perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land and the issuing of patents for all (agents) (grants) of land under the authority of the government."

Thus it will be seen that the Secretary of the Interior in connection with the Commissioner of the General Land Office form a special tribunal vested with the judicial power to hear and determine the claims of all parties seeking to acquire public lands from the Government and this tribunal is authorized to execute the necessary conveyances to the parties to whom it adjudges are entitled to them.

In the case of a grant of land for railroad purposes the tribunal determines whether the claimant is the beneficiary named in the grant, whether the lands claimed fall within the grant, whether any one else has a superior right to it and whether all the conditions accompanying the grant have been complied with. In case of homestead entries and pre-emption filings the tribunal determines whether or not the claimant can acquire any portion of the public domain and

whether all the numerous facts and legal requirements exist as to entitle the claimant to the land.

The very nature of these powers and duties requires a decision of the questions of law and fact relating to the entire transaction and the power to pass upon the sufficiency of such law and facts rests entirely within such Land Department. A patent or certificate is the record evidence of the judgment of this tribunal and the certification of these lands to the state for the benefit of the railroad company by this tribunal, which was vested with jurisdiction in the premises, furnishes a judgment which is not open to collateral attack.

In view of the acts hereinbefore cited defining the powers and duties of the Secretary of the Interior and the Commissioner of the General Land Office, and in the face of the existing decisions upon the subject, it cannot be maintained that it was without the jurisdiction of the Land Department to decide whether or not the lands in controversy fell within the grant to the railroad company or rightly belonged to it was excepted therefrom.

In delivering the opinion of the court in the case of Moore v. Robbins, Justice Miller uses the following language:

"It is a part of their (the officers of the Land Department) daily business to decide when a party has, by purchase, by pre-emption or by any other recog-

nized mode established a right to receive from the goverment a title to any part of the public domain. This decision is subject to an appeal to the Secretary, if taken in time. But if no such appeal be taken and the patent issued under the seal of the United States and signed by the President is delivered to and accepted by the party, the title of the government passes with this delivery."

Moore vs. Robbins, 96 U. S. 530, 533.

The learned counsel for the Goverment in discussing the question of the jurisdiction of the Land Department to decide this question has cited several authorities in support of his position that the department was without jurisdiction, but he has wholly failed to note the distinction which exists between the cases which he has cited and the case at bar. Upon an examination of the cases which he has cited the court will readily see that they are actions where the title to the land certified had passed out of the Goverment and hence was not within the jurisdiction of the officers of the Land Department when that tribunal decided and attempted to convey it. In other words, they are cases where the Land Department has no jurisdiction to hear and determine the respective claims, or to dispose of the lands after such determination. On the other hand there are a long line of cases holding that where the Land Department has the power to hear and determine the claims of applicants for the lands of the United States and upon such determination to dispose of such

lands under pre-emption or homestead laws, or grants for railroad or other corporations, that the certificate issued from the department conveyed the legal title and was not subject to collateral attack.

French v. Fyan, 93 U. S. 169, 172.

Quinby v. Conlan, 104 U. S. 420.

Steel v. Smelting Co. 106 U. S. 447, 450, 452.

Heath v. Wallace, 138 U. S. 573, 585.

Knight v. U. S. Land Association, 142 U. S. 161, 212.

Barden v. N. P. R. R. Co. 154 U. S. 288.

Minter et al v. Crommelin, 18 Howard 87, 89.

A careful reading of these cases has convinced us that the case at bar comes squarely within the decisions there laid down, to-wit: that where the Land Department or other special tribunal has the power of disposition and the jurisdiction to determine the claims of applicants for public lands under the acts of Congress the patents or certificates issued by such Department are impervious to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the party named in the certificate.

Minter et al v. Crommelin, 18 Howard, 87, 89.

If the Land Department had had no jurisdiction to determine the claims of applicants for the lands in question and no power to dispose of them, then and

only then would the certificate be absolutely void and convey no title. With these rules before us it is not difficult to determine whether the certificates issued in this case were void or voidable. The Land Department in this case certainly had the power to enter upon the inquiry, hear the evidence and determine the respective claims of applicants for the land in question, and having such power it has jurisdiction in the premises and it matters not whether its conclusion or decision in the matter is right or wrong.

The language contained in the opinion of the learned Judge of the Court of Appeals is very clear and convincing upon this branch of the case and we herewith quote from his opinion:

"When these certificates were issued the Winona Railroad Company had undoubtedly applied to the Land Department for conveyances of the lands in controversy to the state for its benefit. The lands were a part of the public lands of the United States, the disposition of which had been entrusted to that Department by the acts of Congress which established it and defined the powers and duties of its officers. Moreover, the acts of Congress under which the Winona Company claimed these lands expressly provided, as we have seen, that the Secretary of the Interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the Land Department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to "indicate" the lands granted by certificates or patents

to the state. In no other way could they have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves and the class to which they belonged, the time of the definate location of the line of the railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally, the legal effect of all these and all other material facts upon the claim of the railroad company to receive the lands under the acts of Congress. It now appears that they were mistaken as to the legal effect of these facts, but the question they decided was one which they were obliged to decide before they issued the certificates, and although their decision and their conveyances evidenced by these certificates may be voidable they are not absolutely void. They are impregnable to collateral attack, and they conveyed the legal title to the lands to the State and its grantees."

Transcript of Record, pages 403, 404.

SUPERIORITY OF THE RIGHTS OF BONA FIDE PURCHASERS OF THE LANDS IN CONTROVERSY OVER ANY ALLEGED EQUITABLE RIGHTS OF THE UNITED STATES.

Having clearly established that the certificates by which the lands in controversy were conveyed to the Winona Railroad Company even though erroneously issued, are merely voidable, the next question

which confronts us is, has the United States any equitable rights superior to that of *bona fide* purchasers who acquired the legal title to the lands from the railroad company before the government gave any notice of the mistake of its officers or of its claim to recover the lands? The equities existing in favor of *bona fide* purchasers of the lands in controversy appear to us to be much greater than the equities which the United States can now assert, and the United States is certainly entitled to no greater consideration in the determination of this question than an individual under like circumstances. In the first place if these lands were erroneously certified it was the fault of the officers of the government and the government itself should suffer the consequences rather than an innocent bona fide purchaser who has had no knowledge or notice of any mistake or error and is in no wise to blame. In the case of Boone v. Chiles, Mr. Justice Baldwin uses the following language:

"A court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. (Sugden on Vend. 722.) Strong as a plaintiff's equity may be it can in no way be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he

has a right to demand protection and relief, which a court of equity imparts liberally."

Boone v. Chiles, 10 Peters, 176, 209.

There are numerous opinions bearing directly upon this subject which hold that the United States, in a suit in equity to annul certificates or patents issued by it for alleged errors of the Land Department, cannot insist upon a cancellation of the certificates or patents so as to affect innocent purchasers under the patentees or orginial holders of certificates.

U. S. v. Burlington etc. R. R. Co., 98 U. S. 334, 342.

U. S. v. California etc. Land Co., 148 U. S. 31, 41.

U. S. v. Wenz, 34 Fed. Rep 154.

A comparison of equities of the innocent purchasers of these lands under these certificates with those of the government must at once convince this court that the equities of the government are far inferior to those of such purchasers and should not prevail against them. The purchasers under the government certificates have bought and paid for the lands in controversy, have made valuable improvements upon them and have paid taxes thereon for a great many years. If the Land Department had decided that the railroad company was not entitled to these particular lands, when it decided to the contrary, the railroad company would have been entitled to an

equal number of acres within its indemnity limits in lieu of them; so as a matter of fact the railroad company received no more land than it would have done had the decision of the Land Department been to the effect that the grant did not attach to the lands in controversy. Now no lands can be found within the indemnity limits of the Winona Railroad Company with which to take the place of the lands in controversy. Under this state of facts it cannot be consistently claimed, after the certificates of the Land Department have stood unchallenged from fifteen to twenty years, that the government possesses any equities in the land equal to those of *bona fide* purchasers.

BONA FIDE PURCHASERS NECESSARY PARTIES IN THE DETERMINATION OF THE SUIT.

There is nothing in the act of 1887 which precludes purchasers who hold the legal or equitable title from making any and every defense which they may have under the well established rules of equity jurisprudence. Prior to the passage of the act of 1887 these purchasers certainly had the right to be made parties to an action of this kind and character and to interpose any and all defenses which they possessed.

The act itself has deprived them of none of these privileges. On the other hand a reading of the act convinces us that additional privileges have been granted to them. The holders of the legal title under the well settled rules of equity are necessary parties to a suit to annul that title, and the fact that the holders of it are *bona fide* purchasers for value, without notice of any defects, is a perfect defense to this suit.

UPON THE SUBJECT THAT THE LANDS IN CONTROVERSY HAVE PASSED TO BONA FIDE PURCHASERS AND CANNOT BE RECOVERED BY THE GOVERNMENT.

The determination of this question is one of fact and the trial court, after a full hearing and consideration of the evidence, decided this question against the appellant. The finding of that court is therefore presumptively correct, and under the decisions, unless an obvious error has intervened in the application of the law or some mistake has been made in the consideration of the evidence, it should not be disturbed.

Warren v. Burt, 58 Fed. Rep. 101.
Tilghman v. Proctor, 125 U. S. 136.
Kimberly v. Arms, 129 U. S. 512.
Evans v. Bank, 141 U. S. 107.
Furrer v. Ferris, 145 U. S. 132, 134.

A careful examination of the law and evidence in this case convinces us that no error or mistake has been made by the trial court in the application of the law or the consideration of the evidence.

As defined by Mr. Pomeroy, "The essential elements which constitute a *bona fide* purchaser are, therefore, three: a valuable consideration, the absence of notice, and the presence of good faith." If, therefore, the Land Company and the present owners of these lands are *bona fide* purchasers within the rule above quoted, their rights will prevail over the claim of the government, notwithstanding the provisions of the Adjustment Act of 1887.

The question whether or not the defendants for whom we appear are bona fide purchasers depends, First, whether or not they paid a valuable consideration for the land; Second, whether or not they purchased without notice of adverse claims now set up by the government to the land in question, and Third, whether or not their purchase was made in good faith.

The uncontradicted testimony of Heinrich Gohrman and the other thirteen defendants, for whom we appear, clearly establishes and proves, as does the defendants' Exhibit on page 360 of the Record—likewise undisputed—that they are innocent purchasers for valne of the land which they now own. The amount and date of their several payments is clearly set forth in the exhibit referred to, and counsel for the

government does not dispute the fact thus established.

From the agreed statement of facts in the record it is equally conclusive that the defendant Land Company paid a valuable cousideration for the land which it obtained from the Railroad company, the certification of which the government now seeks to cancel. This statement shows that the present line of the Winona & St. Peter Railroad Company was surveyed and definitely fixed in 1858 by the Transit Railroad Company as far west as range 31. With this last mentioned company Barney and his associates were in no way connected. This line includes the tract in the Marshall case and also the land known as the McOuat tract.

The Transit Railroad Company by reason of its failure to build the proposed line of road forfeited its charter and grant. On March 10, 1862, the defendant, the Winona & St. Peter Railroad Company was organized by act of the Legislature of the State of Minnesota and succeeded to all the rights, privileges and franchises of the Transit Company. On October 31, 1867, five years after the organization of the Winona & St. Peter Railroad Company, it completed the road from Winona to Waseca, a distance of 105 miles. In the meantime Mr. D. N. Barney and his associates in the contract known as "the Barney contract" became interested as stockholders in the said Winona & St. Peter Railroad Company,

and on October 31, 1867, they owned the stock of the company.

See testimony of Mr. Sykes, Transcript of Record, pages 375, 376.

In constructing this 105 miles of road and at the special instance and request of the Railroad Company Mr. Barney and his associates individually from time to time advanced to the company large sums of money and by the aid of these advances this 105 miles of rood was constructed. In the testimony of Mr. Sykes (see Transcript of Record, pages 375,376) the Chicago & Northwestern Railway Company through one Ogden began negotiations for the purchase of the road in October, 1867, and on the 31st day of October of that year Barney and his associates sold their stock in the Railroad Company to the the owners of the Chicago & Northwestern Railroad Company, and at the same time bought of the Winona Railroad Company as many of its lands as should be received by it on account of the 105 miles of its railroad that had been built. Barney and his associates took the agreement of the Winona Railroad Company to procure the the certification of these lands from the United States and to convey them to the parties to be designated by themselves, and in consideration for such certification of these lands they agreed to take, in full satisfaction of their indebtedness against said company, all the

lands that should be received by it, commencing at its eastern terminus and proceeding westerly until the full quantity was obtained. On that day Barney and his associates paid the Railroad Company in full for these lands by satisfying the debt the Company owed them for constructing the 105 miles of railroad and for money they had loaned it, and relinquished and conveyed all their right, title and interest in the railroad and transferred their possession and control of the same, together with its equipments to the Chicago & Northwestern Railway Company, the purchasers thereof. The exact testimony of Mr. Sykes in regard to this transaction is as follows:

"A part of the consideration to be paid to the said vendors for said railroad and its capital stock was an agreement to sell and convey to the said vendors, Danford N. Barney, Jesse Hoyt, Angus Smith, Wm. G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel N. Hoyt and Alfred M. Hoyt, as many acres of land theretofore granted by Congress to the state of Minnesota as the said Winona & St. Peter Railroad Company should have received from said state by reason of the construction of the portion of the Winona & St. Peter Railroad theretofore constructed, to-wit: one hundred and five miles thereof, extending westwardly from Winona, excepting and reserving, nevertheless, any and all parts and parcels of such land (if any such there be) which may be necessary for the track of said railway, or right of way, or depot or depot grounds thereof, or any other purpose incidental to the operation of said railroad, con-

structed or to be constructed, or any part thereof."

Transcript of Record, page 376.

This certainly was a valuable consideration paid by Barney and his associates. The consideration, therefore, which Mr. Barney and his associates parted with for these lands was not alone the satisfaction and cancellation of the residue of the indebtedness due them from the Railroad Company, but in addition thereto they also surrendered possession and control of the road and of all their interest in the stock, roadbed and other property of the Railroad Company which at the time of the making of the contract they fully possessed and exclusively owned. It cannot, therefore, be maintained, as counsel for the government claims, that the only consideration was a past due indebtedness. There was a present existing valuable consideration in addition to the past due indebtedness which at that time was relinquished and satisfied. In either case, however, the consideration is sufficient to bring these parties clearly within the rule laid down in the case of the Railroad Company v. National Bank, 102 U. S. 14-24, and afford to them the protection of *bona fide* purchasers.

The doctrine that an existing indebtedness or antecedent indebtedness is sufficient for this purpose has obtained in the Supreme Court of the United States ever since the opinion of Justice Story in Swift v. Tyson, 16 Peters 1. The opinion in the case above

cited is discussed and applied to negotiable instruments.

While some of the courts have denied the existence of the rule in the case of the transfer of real property where the property was merely taken as security for an antecedent debt, yet its application in a case where, as in the case at bar, the antecedent debt is fully discharged and satisfied and the debtor relieved from all liability, is not questioned by any court so far as we have been able to ascertain. Mr. Pomeroy very clearly states the law upon the subject:

"A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a *bona fide* purchaser, since the creditor parts with no value, surrenders no right and places himself in no worse legal position than before. The rule has been settled, therefore, in ivery many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of *bona fide* purchase. In some states, on the contrary, even the securing of a pre-existing debt is held to be a valuable consideration."

Railroad Co. v. National Bank, 102 U. S. 14, 24.

Babcock v. Jordan, 24 Ind. 14.

Frey v. Clifford, 44 California 335.

"Whether the complete satisfaction or discharge, or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be a valuable consideration, is a question to which the courts of different

states have given conflicting answers, but the affirmative seems to be supported by the numerical authorities."

Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 49.

In support of this proposition there is cited in the foot notes numerous authorities all of which support the proposition that the satisfaction and discharge merely of an antecedent debt without the surrender or cancellation of any evidence of indebtedness is a valuable consideration.

Soule v. Shotwell, 52 Miss. 236.

Ruth v. Ford, 9 Kan. 17.

Lovs v. Taylor, 26 Miss. 567.

Safflod v. Wades, ex'r. 51 Ala. 214.

Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866.

The Bank v. Godfrey, 23 Ill. 579, 606.

The courts of New York and Michigan hold to the doctrine that extending the time by valid agreement for the payment of an existing indebtedness is a valuable consideration sufficient to support a mortgage, but that the mere taking of collateral security on time without any additional agreement, is not.

Cary v. White, 52 N. Y. 138.

Bostwick v. Dodge, 1 Doug. 413.

Bank v. Dean, 137 N. Y. 110.

Outhwite v. Porter, 13 Mich. 533.

Mayer v. Heidelbach, 123 N. Y. 339.

Ward v. Howard, 88 N. Y. 76.

Honold v. Owen, 31 N. W. Rep. 420.

In Honold v. Owen, *supra*, the question was whether the payment of an antecedent debt constitues a valuable consideration within the rule of *bona fide* purchasers, and in determining the question the Court says:

"And the taking of this land in payment of a precedent debt from Owen to Kays would not, as claimed by the complainant, in this state, prevent Kays from being regarded as a purchaser for value. This deed was not taken as security, as in the case of Boxheimer v. Gunn, 24 Mich. 372, but was an absolute conveyance, for which Kays agreed to pay and did pay, two notes upon which Owen was primarily liable, thus discharging Owen from the debt. But if the notes had been payable by Owen to Kays, and therefore evidencing a precedent debt, a surrender of the notes to Owen or Kays, or a cancellation or destruction of them, would nevertheless have furnished a sufficient consideration for the deed. The doctrine that the extinguishment of a pre-existing debt is not a valid and sufficient consideration for the transfer of a negotiable instrument was repudiated in Bostwick v. Dodge, 1. Doug. (Mich.) 413; and it has ever since prevailed in our state that such discharge of a precedent indebtedness is a good consideration, in such a case, as the payment of money, or the delivery of any species of property whatever. Outwite v. Porter, 13 Mich. 533, 539. In Baker v. Pieraon, 5 Mich. 456, it was held that the holder of a mortgage given for a precedent debt was a purchaser for value."

In the case at bar it is not necessary for us to rely wholly upon Mr. Pomeroy's statement that "the weight

of authority is to the effect that the complete satisfaction or discharge or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by a creditor, will constitute him a *bona fide* purchaser."

The court will observe upon examining Exhibit 12, pages 79 and 80, Transcript of Record, that after reciting the fact that Barney and his associates at the request of the Rsilroad Company loaned and advanced large sums of money to it and constructed 105 miles of railroad for the company, and that the company was indebted to them therefor in a large sum of money, the parties use the following language:

"And WHEREAS the said parties have agreed upon the terms of liquidation, settlement and payment of all such indebtedness and the adjustment of matters between them on the terms hereinafter stated"; then follow the terms of such settlement and payment. First, Mr. Barney and his associates are to retain the first mortgage bonds of the road for two million dollars in part payment of such indebtedness. Second, in further payment and satisfaction of such indebtedness the company agreed to issue to them a certain amount of full, paid-up capital stock of the company, together with certain bonds, etc. On page 80, Transcript of Record, the following language is used:

"Now, for the residue of said indebtedness of the said party of the second part to the said parties of the

first part, the said party of the second part has agreed to sell and convey to the said parties of the first part as many acres of land heretofore granted by Congress to the State of Minnesota as the said party of the second part shall receive from the said state by reason of the construction," etc.

These paragraphs of the contract just quoted show very conclusively that these lands were accepted in full payment and satisfaction of the indebtedness existing between the Winona Company and Barney and his associates, and in addition thereto we find the further evidence of the fact in the express language made use of in the contract,—Transcript of Record, page 81, folios 463-4:

"And the said parties of the first part hereby covenant, promise and agree to and with the said party of the second part, that the said parties of the first part shall and will receive and accept the property and things here inbefore agreed to be transferred to them in full payment, satisfaction and discharge of all indebtedness of the said party of the second part to the said parties of the first part, or either of them."

The entire contract between the Railroad Company and the Barneys must be read together, and if this is done it clearly appears that the consideration for the agreement on the part of the Railroad Company to convey the lands in question was the agreement of Barney and his associates to accept the terms agreed upon in settlement, liquidation, payment, etc. Barney and his associates did not receive this contract as security for the future payment of the company's indebt-

edness to them and therefore they do not come within the rule laid down by some of the courts which hold, that receiving the property as security merely is not sufficient to entitle them to the protection of *bona fide* purchasers. What they did was to completely and entirely satisfy the indebtedness in consideration of the agreement of the company to convey to them these lands, and in addition to their satisfying that portion of the indebtedness and as part of the same transaction they surrender unto the company their possession and all their right, tittle and interest in its equipments and in the stock of the company, as well as all control over it. The legal effect of this contract upon the title and ownership of these lands has been thoroughly considered by the Supreme Court of this State and by the Supreme Court of the United States. In construing this contract the Supreme Court of Minnesota said:

"That Company (Railroad Company) had made in 1867 a contract with A. N. Barney and his associates upon a consideration *already* fully received by the company to convey the lands to them, or to such person or persons, in such manner, and from time to time as might be desired by Barney and his associates. This is the land contract considered in the case referred to (State v. W. & St. P. R. Co., 21 Minn. 472) in which we held that, as the entire consideration for the sale of the lands had been received by the company before the contract was made, it was a sale of the lands, with a covenant to convey, passing the equitable title to the purchasers."

Mr. Justice Field, in the case of Barney v. Railroad Company 113 U. S. 618, uses the following language:

"On the thirty-first of October, 1867, the Railroad Company agreed with the plaintiffs upon sufficient consideration to convey to them as many acres of land, previously granted by Congress to Minnesota, as the company should receive from the state by reason of the Construction already had of the portion of the Winona & St. Peter Railroad, estimated to be one hundred and five miles."

That the legal effect of this contract was to invest Barney and his associates with the absolute ownership of these lands has never been questioned by any court nor by the parties. On the contrary, it has been universally held that by this contract the company sold the lands and received the proceeds of such sale; that it retained no lien upon nor actual interest in them and that it retained nothing but the naked legal title as trustee for the purchasers, which it conveyed long prior to the commencement of this suit, or the assertion of any claim upon the part of the government to the lands in question. Counsel for the government treats the Land Company as standing in the place of the parties of the first part to the Barney contract. They also seek to bind the Land Company by their construction of the facts and circumstances surrounding the original transaction; for this reason we deem an examination of the law and facts concern-

ing that transaction necessary to a just determination of the case.

Neither Barney nor his associates nor the Land Company, nor any of the defendants in error who purchased from any of them, discovered any error in the certification of the lands in controversy or received notice of any claim of the United States to any of these lands, or any defect in the title to them until about March, 1891, at which time the United States demanded the re-conveyance of them from the Railroad Company under the act of 1887. In the meantime many of the lands had been sold by Barney and his associates and by the Land Company and they were then held under deeds and contracts from them by their immediate and remote grantees, many of whom had paid taxes and made valuable improvements upon the land. The Land Company itself has paid taxes upon them to the amount of $7,993.33. No final adjustment of these land grants between the United States and the Railroad Company had ever been had.

Upon this state of facts it would seem clear that Barney and his associates were purchasers of the land for a valuable consideration and without notice, and a stronger chain of facts exist in favor of the Land Company.

We respectfully maintain that the Land Company is an artifical compauy, entirely separate and distinct

from the natural persons owning shares of its stock and that as such it paid a valuable consideration for these lands independent of Mr. Barney and his associates. It was not organized until almost nine years after the purchase of the land by Mr. Barney and his associates. It was organized under the laws of this state in April, 1876. Some of the incorporators of the company were interested in the original purchase of these lands from the Railroad Company, while some were not. Among the first officers of the company were Charles T. Barney, secretary and treasurer, and H. W. Lamberton, land commissioner. These gentlemen have since the organization of the company filled these offices, but neither of them were parties to the Barney contract. The first board of directors consisted of nine persons, four of whom were in no way connected with the original purchase of the land. The capital stock of the company, $500,000, authorized by its articles of incorporation, was issued and used in the purchase of these lands.

In answer to the question, "Now can you tell us, Mr. Barney, how the Land Company came to purchase these lands and other lands situated in Minnesota within the grant of the Winona & St. Peter Railroad Company and what the consideration for the purchase was," Mr. C. T. Barney replied, "They purchased them and the stock issued by the company was delivered by it in payment for the land."

Q—As I understand you, the company was organized and issued its stock for $500,000? A—The company was organized and issued stock for $500,000, yes sir.

Q—And with this stock the company purchased the interest of certain parties in the land in controversy together with other land? A—Yes sir.

This testimony stands uncontradicted. In addition thereto, on the first two pages of the company's journal, we find that this was one of its first transactions. (See Transcript of Record, page 136).

"Exhibit B" is a copy of the instrument by which the defendant Land Company acquired its title. (See Transcript of Record, p. 136-137.) It is not a deed of warranty but it is something more than a deed of quit-claim and release; it comes entirely within what Mr. Justice Brewer in U. S. v. Cal. & Oregon Land Co., 148 U. S. 46 and 49 defines as "a deed of bargain and sale and will convey an after acquired title."

Between the dates named in the eleventh paragraph of the Land Companpy's answer the Railroad Company conveyed to it the legal title to all the lands therein described. It is admitted (Transcript of Record, p. 363, 364) that the deeds for this purpose were special warranty deeds. It is also admitted that the legal title to the lands described in paragraph 13 of said answer was conveyed by the Railroad Company in the form and manner prescribed by order of the Circuit

Court of the United States. (Transcript of Record p. 356, 367.)

The defendant Land Company, therefore, before the commencement of this suit had acquired the legal title to the lands in question under these several deeds of conveyance and the consideration paid by it was its stock. Was this a valuable consideration within the rule determining who are *bona fide* purchasers?

In the case of Frenkell v. Hudson, 2 So. Rep. 758, this question was considered by the Supreme Court of Alabama upon precisely the same state of facts upon which its determination depends in the case at bar. In that case it appeared that the property in question was conveyed to the Improvement Company for a recited consideration of $20,000 in payment of the stock of the company. It was claimed in the bill that the Improvement Company paid nothing for the land and also averred at the same time that the only consideration for the property was stock in the company. The Court says:

"The testimony abundantly shows that stock certificates were issued to Goelet, precisely to what amount, it does not say, but whether the certificates were issued or not, his subscription was *pro tanto* paid and satisfied by the conveyance of the property. The issue of the certificates would confer no rights additional to the ownership of the stock, the rights thus secured by Goelet obviously constituted a valuable consideration. He thereby became the holder of a large amount of corporate stock, which was valuable

property, subject to ownership, transfer, levy and sale. Such ownership also invested him incidentally with the valuable right of voting at stockholders' meetings, of participating in the management of the corporate business and of sharing in the dividend of profits, to say nothing of the right to receive his aliqnot part of the capital on dissolution of the corporation or termination of its corporate existence, free from debt. Cook, Stock and Stockholders, Secs. 5-10. Fisher v. Essex, 5 Gray 373. If this be not a valuable consideration it would be difficult to define what it would be. The case is entirely different from the mere agreement of a creditor to take goods in payment of an indebtedness past due, and entering a credit on account for the price, without surrendering anything valuable, which has been held not to constitute such creditor a purchaser for value. * * * * We hold that, under the facts declared in the record, the defendant corporation was a purchaser for value of the property in controversy."

The stock of the Land Company is in this State personal property. (Sec. 48, title 2, chapter 34, General Statutes of Minnesota, 1878.) The transfer and delivery of it to Barney and his associates in payment of the land constituted a good and valuable consideration.

There being no constitutional or statutory prohibition in Minnesota, the payment of the stock in land was legal. This is now the well settled doctrine.

2 Mor. Corp., Sec. 826.

Coffin v. Lansdell, 110 Ind. 417.

Walburn v. Chenault, 43 Kan. 352.

Young v. Erie Iron Co., 65 *Mich.* 111.

Fort Madison Bank v. Allen, 129 *U. S.* 372.

Coit v. North Car. Gold Co., 119 *U. S.* 343.

In any view of the case, therefore, the facts disclosed by the record conclusively show that the Land Company paid a valuable consideration for the land and that this element, essential to constitute a *bona fide* purchaser, is fully established.

TBE ELEMENT OF NOTICE.

The second essential element in a *bona fide* purchase is the want of notice or knowledge of the existence of any facts or circumstances that would charge a reasonably prudent man with the duty of making inquiry to ascertain the existence of any alleged defect in his title. Neither Barney nor his associates, nor the Land Company, nor any of the present occupants had notice of the claim now made by the government, nor did they have any knowledge or information that would prompt a reasonably prudent man to make such inquiry as would lead to the discovery of any such claim.

Counsel for the government seeks to charge the Land Company with notice on the ground that Bar-

ney and his associates, who were incorporators of the Land Company at the time they purchased the land in 1867, owned stock of the Winona & St. Peter Railroad Company. When these facts are considered in connection with the present claim of the government, it must appear to any one that they do not constitute any basis whatever for the claim that the Land Company had notice or that it is chargeable with notice. Their connection with the Railroad Company ceased long before these lands were even applied for and before anything had been done that would even suggest the now alleged error in their certification.

The government seeks to cancel the certificates by which these lands were conveyed to the state upon the ground that when the map of definite location of the line of the road was filed, preemption entries and homestead filings previously made, excepted the land from the operation of the grant and that their subsequent certification to the state is, therefore, erroneous.

After October 31, 1867, Barney and his associates were in no manner connected with the Railroad Company. It was at that time that they became the purchasers of these lands. Then the Railroad Company had done nothing towards securing the legal title thereto, except to earn the land. Under the Barney contract the duty of applying for and securing from the government the legal title to the land devolved upon the Railroad Company. None of the lands in-

volved in this controversy were applied for until 1872, five years after Barney and his associates severed their connection with the company, and none of the lands were certified by the government to the state prior to February 28, 1872. Certainly there was nothing in the physical fact of definitely fixing and locating the line of the road while Barney and his associates were officers of the compauy, nor was there anything which the company did or omitted to do in building the road from Winona to Waseca upon which the government now bases its action for the cancellation of these certificrtes. The error, if any occurred, was committed when the lands were applied for at the local land office in 1872 and when these pre-emption filings and homestead entries were cancelled and the lands described in the lists certified to by the local land office as falling within the grant of the company.

The second alleged error was committed in the land department of the government at Washington when these selections by the Railroad Company in 1872 were ratified and confirmed by the commissloner of the general land office, and the third alleged error was the erroneous certification by the government of the land thus excepted from the operation of the grant.

All these alleged errors on which the government now bases its claim to the land in question, occurred long after Mr. Barney and his associates had ceased to have any connection whatever with the Railroad Com-

pany selecting the land. They occurred also long after Mr. Barney and his associates had parted with and fully paid the consideration for the land. Nothing they could have done, no inquiry they could have made would have disclosed the existence of these alleged defects in their title, for no error at that time on the part of the administrative or executive officers of the government had occurred to affect their title. The government itself did not at that time know of any error whatever committed in the certification of these lands.

How is it possible, therefore, to charge a purchaser of the land with notice? If Mr. Barney and his associates, when the lands were applied for and before paying the consideration, had been connected with the Railroad Company as its officers, there might be some ground for charging them with notice of the erroneous certification of the lands. But in that case it could only be done by presuming their knowledge of the law, which the government itself by this action admits it was ignorant of and did not know until many years thereafter when the Supreme Court of the United States changed the rule as to the time when the rights of the company attached to the grant. Since neither Mr. Barney nor any of his associates were in any manner connected with the road when these lands were selected and certified, and when these alleged errors occurred, there is certainly no ground upon

which they can be successfully charged with such notice as is necessary to deprive them of the protection of *bona fide* purchasers. Under all the facts they must be considered as having purchased without any notice whatever of any defect in their title and without even an opportunity to ascertain such defect, if any existed.

Warner v. Sibley, 19 N. W. Rep. 40.

McCleary v. Wakefield, 41 N. W. Rep. 210.

If, therefore, Barney and his associates cannot be charged with notice, there is no ground upon which such charge can be successfully made against the Land Company. It likewise purchased and paid for these lands long before the government knew or asserted any claim to them or had any reason to believe that it erroneously certified the same to the state.

In the determination of this branch of the case we wish to briefly summarize the facts as they relate to this transaction.

The Railroad Company before 1881 had conveyed to the parties entitled to them under the contract of October 31st, 1867, all the lands in controversy except 240 acres that had been certified to the Sioux City Company and except the lands conveyed to the Land Company on November 20th, 1887, pursuant to the decree of the court in the Winona & St. Peter Railroad Company v. Barney. The decree in that case

that the land should be so conveyed was rendered in the Circuit Court in April, 1881, and was subsequently affirmed upon appeal, but so far as the question of notice is concerned there was absolutely no change in the status of affairs from 1867 until after the decision of the Supreme Court in the case of the Kansas Pacific Ry. Co. v. Dunmeyer in 1884, which decision changed the former ruling laid down by the Secretary of the Interior as to when the line of definite location of a railroad, which determines the right of railroad companies to land under land grant acts of Congress, is definitely fixed. Barney and his associates purchased these lands in 1867 and at that time only 320 acres had been certified to the State. The evidence clearly establishes the fact that none of these purchasers had any notice of any defects in the title to any of these lands. In 1867 Barney and his associates paid for these lands. After 1867 they owned none of the stock of the Railroad Company and had no control in its operation. At that time they certainly could not have had notice or knowledge that the Secretary of the Interior would subsequently indicate, and that the Railroad Company would in 1872 and in subsequent years receive lands to which it might not be entitled under its grants. Barney and his associates and their successor in interest, the Land Company, had no option under their contract as to what lands they

should receive from the Railroad Company but were compelled to accept such lands as the Railroad Company should receive from the government. Barney and his associates nor the Land Company had nothing whatever to do with the application for procuring the certification of the lands to the State between the years 1870 and 1880. It was the Winona and St. Peter Railroad Company and at that time the affaits of that company had past beyond the control of Barney and his associates. There can be no question but what the Railroad Company applied for and the officers of the Land Department certified the lands here in question in the utmost good faith, all believing that they rightfully belonged to the Railroad Company. If there has been any mistake in the certification of these lands to the Railroad Company it is the mistake of the officers of the Land Department and not that of Barney and his associates or the Land Company. The evidence is very clear upon the subject that neither the Land Company, nor Barney nor any of his associates had any notice or knowledge of any alleged mistake or of any alleged claim of the United States to any of these lands until long after they had paid the full purchase price for them. Indeed the United States itself did not discover anything in the nature of a mistake until 1884, eight years after the Land Company had fully paid for the lands. Up to 1884 the officers of the Land Department had uniformly held that the

Railroad Company had earned these lands when the line of railroad had been staked out and fixed upon the face of the earth and that it was, therefore, entitled to these lands under act of Congress. The Land Department having jurisdiction in the premises and being charged with the duty of executing the act of Congress, its decision should be treated with great consideration by the courts.

U. S. v. Moore, 95 U. S. 760, 763.

Brown v. U. S., 113 U. S. 568, 571.

U. S. v. Burlington etc. R. R. Co., 98 U. S. 334.

In view of the high authority which held that the lands in question attached to the grant to the Railroad Company and that it was entitled to them, the purchasers of the title were certainly justified in resting with perfect reliance upon their title.

Even though Barney and his associates, by reason of their early connection with the Railroad Company, could be chargeable with notice, it would not follow from that fact that the Land Company was likewise chargeable because of their subsequently becoming interested in the Land Company as officers and stockholders.

In Frenkell v. Hudson, 2nd So. Rep. 758, the question of how far a corporation was chargeable with notice of an existing claim against certain real estate

which it purchased, the knowledge of which claim was in possession of the president of the company, was very fully considered. The Court says:

"The only mode in which it is sought to bring home notice to the company is through its president Goelet, who had actual knowledge of the alleged agreement, and it is insisted that the knowledge of the agent must be imputed to the principal. The general rule is that notice of a fact acquired by an agent while transacting the business of his principal, operates constructively as notice to the principal. This rule applies, of course, as well to corporations as to natural persons. Reid v. Bank of Mobile, 70 Ala. 199. It is upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communnicate the information obtained by him to his principal so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his owu interest; and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: *First*, that he will very likely, in such case, act for himself rather than for his principal; and, *secondly*, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule on this subject. Terril v. Branch Bank of Mobile, 12 Ala. 502; Lucas v. Bank of Darien, 2 Stew.(Ala). 321; Wickersham v. Chicago Zine Company, 18 Kan. 841 Am. Rep. 784; Ang. & A. Corp., Sec. 308-309, Story Ag. Sec. 140."

RIGHTS OF STOCKHOLDERS.

Since the organization of the Land Company and before the government asserted any claim to the land in question, the stock of the Land Company was bought and sold by persons who never had any connection with the Railroad Company whatever. When this suit was instituted almost the entire stock which represented these lands and which the company still owned, was owned and held by persons who purchased the same for value and in good faith, without notice, and in the full belief that the company's title to the land, which their stock represented, was absolute and perfect. See testimony of Chas. T. Barney, Transcript of Record, page 129 and following, and testimony of Alfred M. Hoyt, Transcript of Record, page 139 and following.

The cancellation of the patents by which this land was conveyed by the general government to the state, which patents were the inducing cause for the purchase of this stock, will result in irreparable loss and injury to these stockholders, and depreciate the value of their stock to that extent in violation of their rights as innocent purchasers.

THE ELEMENT OF GOOD FAITH.

The only other condition essential to a *bona fide*

purchaser is that the purchase shall be made in good faith. There is no evidence in the case of any fraud, or of any conspiracy, or of any attempt on the part of any of the parties connected with this transaction to obtain for the Railroad Company or for themselves any lands to which they were not justly entitled. The officers of the Railroad Company believed that the company had earned and was entitled to receive the lands in question. Barney and his associates and the Land Company accepted the title to the lands in controversy in perfect good faith in full satisfaction of the contract to convey, and fully paid for them as early as 1876. That they and their grantees were possessed of the legal title to all these lands before the United States made any claim to recover them, and that these lands were purchased by Barney and his associates and by the Land Company in good faith cannot be questioned by any one. There are no facts or circumstances surrounding the transaction to justify the claim that they were not so purchased. The consideration paid was full and complete. The transaction is evidenced from beginning to end with the utmost fairness and honesty. Although this "Barney Contract" has been the subject of litigation in the state and national courts yet no one has ever intimated that the transaction was tainted in the least with anything that could be construed into an evidence of bad faith on the part of either of the parties to the sale and purchase of these lands.

In the United States v. Burlington & M. R. R. Co., 98 U. S. 334, we find the following: "It (the United States) could not certainly insist upon a cancellation of the patents so as to effect innocent purchasers under the patentees." We also quote from the decision in the Col. Co. & I. Co. v. U. S, 123 U. S. 307:

"It was fully established by the evidence that there were in fact no actual settlements or improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claim and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those placed under them with notice of it to justify the cancellation of the patents issued to them. *It is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of bona fide purchaser for value, without notice, is perfect.*"

The case of the United States v. Cal. & Oregon Land Co. 148 U. S. 31, is analogous to the case at bar. In that case the government granted a quantity of land to the state of Oregon to aid in the construction of a military road. The land was thereafter certified to the state and conveyed to the company. Subsequently it was sold by the company to individuals who organized the California & Oregon Land Company. The government thereafter claimed that the lands were erroneously certified, and congress passed

an act on March 2, 1889, authorizing suit for the cancellation of the certificates by which the legal title was instituted and the Land Company was made a party defendant. It interposed the plea of being a *bona fide* purchaser for value and without notice. Mr. Justice Brewer, in delivering the opinion of the Supreme Court, after quoting from the decision in Col. Coal & I. Co. v. United States, *supra* said: "The Land Company, therefore, had a right to set up a special plea, and the plea which it did set up—that of a *bona fide* purchaser—was sufficient, if true."

If Barney and his associates and the Land Company are *bona fide* purchasers of these lands it goes without argument that the parties claiming through or under deeds, contracts or other instruments made by any or either of them are as fully protected as they are.

WERE THE LANDS WITHIN THE INDEMNITY LIMITS OF THE ST. PAUL & SIOUX CITY RAILROAD COMPANY RIGHTFULLY CERTIFIED TO THAT COMPANY?

The contention on behalf of counsel for the government is that the lands in the grant to the St. Paul & Sioux City Railroad company within its indemnity

limits were not properly certified to such company, notwithstandlng the fact that the homestead entries and pre-emption filings had been cancelled prior to the time of the certification of such lands to the Sioux City Company.

In order to maintain this position counsel must establish the legal proposition that the grant of land within the indemnity limits attached at the time the line of railroad was definitely fixed and determined. This proposition, however, cannot be successfully maintained. The learned Court of Appeals argues this branch of the case in a most forcible and convincing manner, and his conclusion that the lands subject to the grant within the place limits are those that were public lands when the line of road was definitely fixed, and the lands subject to the grant within the indemnity limits are those that were public lands when they were selected by the company and their selection was approved, is so manifestly correct as to require very little argument. At the time the lands within its indemnity limits were selected by the St. Paul & Sioux City Railroad Co. the homestead entries and pre-emption filings had been cancelled by the government and the lands were accordingly a part of the public domain, and if so, the grant by Congress attached to them and they were properly certified to the Sioux City Company.

The whole question depends upon whether the

lands were a part of the public domain at the time they were selected by the Sioux City Company as a portion of the land within its indemnity limits. No lands granted to a Railroad Company within its indemnity limits vest any rights in such company to any particular lands until they have been selected. "Within place limits" portion of a land grant to a railroad becomes effective when the map of definite location of road is properly filed. The "indemnity limits" in such a land grant becomes effective when the selection is made and not until then. There can be no question but that public lands of the United States at the time of the filing of the map of definite location of a railroad would be subject to a grant for railroad purposes; neither can there be any question but that public lands of the United States at the time they were selected by a railroad company within its indemnity limits would be subject to such grant.

The case of Kan. P. Ry. Co. v. Atchison R. R. Co., 112 U. S. 414, and the case of Ryan v. R. R. Co., 99 U. S. 382, 388, clearly establish the doctrine for which we contend. For a full discussion of this branch of the case we would respectfully refer the Court to the opinion of the learned Judge of the Court of Appeals, Transcript of Record, pages 408-9-10-11-12.

If the lands in controversy have not been erroneously certified then the United States cannot in a suit

in equity recover these lands, irrespective of the question of whether the Winona Company holds these lands when the Sioux City Company should have been permitted to retain them. The act of 1887 authorizes suit to cancel patents, certificates or other evidence of title to lands "*erroneously certified or patented*" and "*to restore the title thereof to the United States.*" Therefore, unless the United States can establish the fact that these lands were erroneously certified or patented it has no standing in court, regardless of the question in whose possession these lands now are.

It clearly appears that the lands were properly and not erroneously certified from the United States to the State for the benefit of the St. Paul & Sioux City Railroad Company. Such being the case the United States is precluded from asserting any claim to the lands for the reason that it has no interest in them, and the controversy between the Winona & St. Peter Railroad Company and the St. Paul & Sioux City Company is *res adjudicata* in so far as the United States is concerned. If the lands have been properly certified or patented to either of the last named companies the United States in this suit cannot bring itself within the provisions of the act of 1887 and cannot, therefore, maintain an action to recover any of these lands.

This we think disposes of all the material assignments of error presented by counsel for the govern-

ment. The law is in full accord with the position of the defendants in error and the facts as they appear from the uncontradicted evidence contained in the record of the case fully support each and every legal proposition for which we contend. We therefore respectfully maintain that the decision of the Court below should be sustained.

All of which is respectfully submitted.

J. A. TAWNEY and

H. M. LAMBERTON,

Solicitors for the Winona & St. Peter Land Company and fourteen other defendants in error.

165-482

Office Supreme Court, U. S.
NOV 6 1896

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. ~~108~~. 322.

UNITED STATES OF AMERICA,
Complainants and Appellants,

vs.

THE ST. PAUL & SIOUX CITY RAILROAD COMPANY, JOHN KAPISKA, ET AL.

BRIEF OF THE APPELLEES.

BRIEF OF FACTS.

THOMAS WILSON,
Solicitor for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO. 703.

UNITED STATES OF AMERICA,
Complainants and Appellants,

vs.

THE ST. PAUL & SIOUX CITY RAILROAD COMPANY, JOHN KAPISKA, ET AL.

BRIEF OF THE DEFENDANTS.

BRIEF OF FACTS.

The tract of land, the title to which is involved in this suit, lies in the six mile place limits of the defendant railroad company's grant, and was certified to the state by the secretary of the interior, April 26, 1864, as a part of the grant made to the territory of Minnesota, to aid in the construction of that line, by the act of March 3, 1857.

Boyd W. Randall, the present claimant, filed on it under the pre-emption law, October 4, 1856, and in April, 1866, the local land officers of the district allowed him to enter it under the pre-emption laws of the United States, and in November, of the same year, that entry was cancelled by the secretary of the interior.

Before the commencement of this suit Randall had applied to have his entry reinstated, which was denied by the secretary, March 27, 1886. The state of Minnesota, on the fourth day of January, 1868, conveyed the land to the defendant railroad company, and that company conveyed it on or before November 2, 1881, to the defendant, Boright, who conveyed it April 17, 1882, to defendant Quackenbush, who conveyed it January 13, 1882, to defendant John Kapiska, who conveyed it April 1, 1888 to defendant Herman Kapiska, who conveyed it May 9, 1891, to defendant Moler, who is still the owner and in possession of it.

All of these conveyances were duly recorded immediately after their execution and were made for a valuable consideration, and all of the purchases were made in good faith without notice of any infirmity in the title of the grantor or of any adverse claim.

On January 8, 1882, defendant Boright, claiming to be the owner, brought suit in the district court of the county in which this land lies, in ejectment, against Randall, who was then in possession, claiming to be the legal owner and entitled to possession, and the court having jurisdiction of the parties and the subject matter, determined and adjudged that the the plaintiff Boright was, and the defendant

Randall, was not the owner, and that Randall was wrongfully in possession and wrongfully witheld possession, and that Boright should recover the possession and damages for the use and detention of the land, which judgment remained in full force and effect, and pursuant thereto, on the fourth day of March, 1882, Randall was, by an execution issued out of said court, dispossessed, and Boright put into possession, and ever since the said purchasers respectively have been in possession, claiming title. (See brief statement of facts, Record pp. 15-18.)

After Randall was thus turned out of possession he continued to live in the same township in which this tract of land is, and most of that time only from one to three miles distant therefrom. He has paid no taxes on it, nor did he inquire or pay any attention to discover whether it was sold for taxes, or who had purchased it or lived on it or what improvements were made on it, although it lies not over 80 rods from the road leading to Le Sueur, the principal town in the county, and over which he was accustomed to travel. This appears from his own testimony. (Record pp. 29–34.)

The uncontradicted evidence of the other witnesses shows that during all that time the land was being cultivated and improved, and that Randall gave no notice nor in any manner indicated that he had, or intended to make, any claim thereto, except at one time to John Kapiska, after he (John) had purchased, and at another time to Herman Kapiska after he (Herman) had purchased, and what he said at those times was in the nature of a complaint

about what had been done rather than the assertion of a right or of a purpose to assert a right, and there is not a scintilla of evidence that Moler, the present owner, had the least notice or reason to believe that the title of his grantor was not perfect, or that any one pretended to have any right or claim to this land. The evidence to the contrary is uncontradicted. And it is also shown by the uncontradicted evidence that Moler paid for said land when he purchased it, $2,900.

This suit is brought under the Act of Congress of March 3, 1887, for the benefit of Randall, on the theory that this tract was excepted from the grant to the defendant railroad company by his pre-emption filing. (See 10 Land Decisions, 54.) The grant to the railroad company it is conceded is short. See statement of facts referred to above.

As this case is to be submitted at the same time with the case of the *United States* vs. *The Winona & St. Peter Railroad Company* and *The Minnesota Land and Investment Company, et al.*, and as many of the questions of both law and fact are the same in both, we respectfully refer to our brief in that as our brief in this. In addition to the points in that case we submit the following:

BRIEF OF POINTS AND AUTHORITIES.

I.

Moler is a *bona fide* purchaser for value, and therefore his title is unimpeachable.

II.

The laches of the claimant, Randall, in whose interest this suit is brought, and the statute of limitations of Minnesota, are a bar to any recovery in this suit.

The complainants have no interest in the result of this suit; they cannot be gainers, directly or indirectly, to the amount of one farthing, by a judgment against the defendants. *Act of March 3, 1887*, above referred to. Hence, the doctrine of laches and the statute of limitations are applicable, and, in view of the facts conclusive.

U. S. vs. *Beebe*, 127 U. S., 338.

Curtner vs. *U. S.*, 149 U. S., 662, 670, 671, *et seq.*;

Hardt vs. *Heidweyer*, 152 U. S., 547, 558, *et seq.*

Galliher vs. *Cadwell*, 145 U. S., 368.

Johnston vs. *Standard Min. Co.*, 148 U. S. 360, 369, *et. seq.*

Hoyt vs. *Latham*, 143 U. S., 553.

Naddo vs. *Bardon*, 4 U. S. App., 642, 681.

Lemoine vs. *Dunklin*, 10 U. S. App., 227, 239, 241.

St. Paul, Stillwater & Taylor's Falls Ry. Co. vs. *Sage*, 4 U. S. App., 160, 181, *et seq.*

Statutes of Limitations of Minn., Stats. 1894, p. 1351, Sec. 1536.

Burk vs. *Western Land Ass'n*, 40 Minn., 506.

III.

The United States have not such an interest in the subject matter as to authorize them to maintain this suit.

U. S. vs. *Minor*, 114 U. S., 233, 244.

U. S. vs. *San Jacinto Tin Co.* 125 U. S., 273, 284–6.

Curtner vs. *U. S.*, 149 U. S., 662, 671, *et seq.*

If they recovered a judgment it would enure only to the benefit of certain private parties. It may be said that there is an Act of Congress authorizing this suit, but that only made it the duty of the attorney general to do what he before might voluntarily have done.

6 Land Decisions, 276.

It does not require him or the courts to disregard the plain rules of equity, and it certainly does not authorize or direct him to bring suit, or the courts to sustain a suit, that would not only be fruitless but inequitable.

Atl. & Pac. R. R. Co., 8 Land Decisions, 165, 172-3.

IV.

The complainants and Randall are estopped from maintaintaining this suit by their laches and by the acquiescence of Randall in the claim and title of the purchasers under the railroad company.

THOMAS WILSON,
Solicitor for Appellees.